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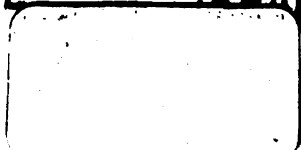
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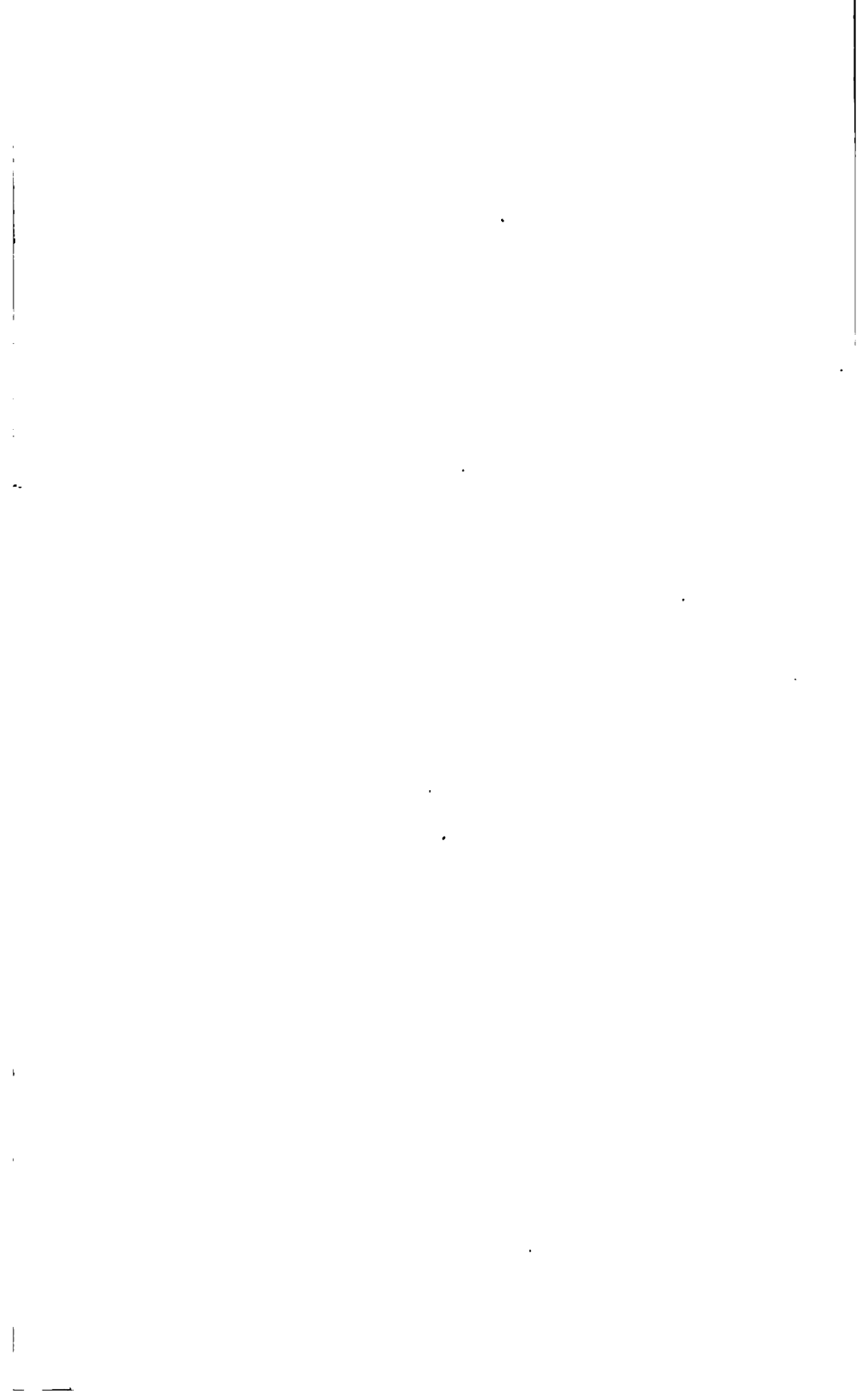
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REPORTS OF CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF THE

TERRITORY OF ARIZONA

FROM 1902 TO 1904 INCLUSIVE.

E. W. LEWIS,
REPORTER.

0

VOLUME EIGHT.

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SUPREME COURT.

1902-1904.

WEBSTER STREET, Chief Justice.¹

EDWARD KENT, Chief Justice.²

RICHARD E. SLOAN, Associate Justice.

FLETCHER M. DOAN, Associate Justice.

GEORGE R. DAVIS, Associate Justice.

OFFICERS OF THE COURT.

ROBERT E. MORRISON.....U. S. Attorney³
FREDERICK S. NAVE.....U. S. Attorney⁴
MYRON H. MCCORD.....U. S. Marshal
CHARLES F. AINSWORTH.....Attorney-General⁵
E. W. WELLS.....Attorney-General⁶
JAMES ALLEN COX.....Clerk⁷
SHELBY M. CULLOM.....Clerk⁸
ANGIE B. PARKER.....Deputy Clerk

¹ Term expired.

² Appointed March 21, 1902.

³ Term expired.

⁴ Appointed February, 1902.

⁵ Resigned July 1, 1902.

⁶ Appointed August 2, 1902.

⁷ Resigned October 17, 1902.

⁸ Appointed October 17, 1902.

AMENDED RULES OF THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

RULE 1.—ABSTRACTS OF RECORD.

I.

In every civil cause brought to this court on appeal or writ of error, the appellant or plaintiff in error must file in this court, with the transcript of the record, at least six copies of an abstract of said record, which shall contain:

(a) The pleadings, original or amended, upon which the issues were tried.

(b) The findings of fact and conclusions of law, or the verdict.

(c) The judgment.

(d) The motion for a new trial.

(e) The minute entries of the trial court.

(f) The bill of exceptions and statement of facts.

(g) Such other portions of the record as may be necessary to inform the court of the errors relied upon without an investigation of the record itself.

II.

The abstract of the record shall be chronologically arranged; shall be prefaced with an alphabetical index of its contents, specifying the folio of each separate paper, order, and the testimony of each witness; and shall have a cover.

III.

Unless some question is predicated upon the formal parts of pleadings, motions, depositions, exhibits, or other papers filed in the trial court and made part of the record on appeal, such formal parts shall be omitted in preparing the abstract, after once stating the venue and title of the cause, giving the

names of the parties in full, and thereafter the venue and title may be indicated by the words "Title of Cause."

(a) In the case of depositions the substance of the testimony contained therein shall be reduced to narrative form, and, unless material, notices, interrogatories, certificates of officers taking the same, signatures of witnesses, etc., shall be omitted.

(b) In the case of deeds, mortgages, contracts, and other exhibits, only the material parts shall be stated, and certificates of acknowledgment and indorsements made by officers thereon shall be omitted, except when these are material.

(b) Indorsements made by the clerk of the trial court showing the date of the filing of the papers shall appear in the abstract by simply noting, "Filed ——," giving the date of the filing.

(d) Exhibits, incapable of being readily incorporated into the abstract, may be omitted, but due reference must be made to the same in such a way as to identify them from other parts of the record.

IV.

In case the appellant shall fail to incorporate into his abstract of the record any portion of the record which the appellee shall deem necessary to a proper determination by this court of the issues on appeal or writ of error, the appellee may embody such omitted portion of the record in a supplemental abstract, which shall be filed and served upon counsel for appellant at the time of filing and serving the brief of appellee.

V.

Abstracts of record shall be printed on white paper, eight inches by ten inches in size, with pica type; or in typewriting (plainly legible, and not exceeding a second impression), with a sufficient margin to permit of their being bound together in book form on the left-hand side, and shall be so fastened.

VI.

The abstracts of record, as filed, will be treated by the court as containing such portions of the record as the parties deem sufficient upon which to try the assignments of error.

VII.

Abstracts of record not conforming to this rule may be stricken from the files on motion of the party affected by such non-compliance, or by the court, of its own motion.

RULE 2.—BILLS OF EXCEPTIONS AND STATEMENTS OF FACTS.

I.

Bills of exceptions and statements of facts may be consolidated into one and the same paper; but in all cases the same shall be in narrative form, tersely and succinctly stated.

Whenever any objection is made to evidence or to any question propounded to a witness, and an exception is taken to the ruling of the trial court thereon, in every such case the question and answer of the witness shall be inserted *totidem verbis*.

The extension of the reporter's notes provided by section 1486, Revised Statutes, to be made a part of the record must be made, certified and filed during the term at which the judgment was rendered, or within such reasonable time thereafter as shall be allowed by the court, or judge thereof, by an order duly entered on the minutes or filed with the clerk. Such transcript as may thus be made out, certified and filed shall be deemed a statement of facts, but shall not be treated as embodying in the record any ruling of the court made during the trial, unless the same shall be allowed and signed by the judge in the same manner as required of a bill of exceptions.

RULE 3.—MOTIONS.

I.

All motions relating to informalities in the manner of bringing a cause to this court shall be filed with the clerk on or before the first day of the term, a copy thereof being served on opposing counsel on or before the same day, otherwise the ground of the objection shall be considered as waived, if it can be waived.

II.

Motions to dismiss for want of jurisdiction of this court, and for such defects as defeat the jurisdiction in the particular cause, that cannot be waived, are recommended to be filed on or before the first day of the term, a copy thereof to be served on the opposite party; but such motion may be made at any time, and shall be entertained by the court, after such notice to opposing counsel as the court may deem proper to be given under the circumstances.

III.

Motions made either to sustain or defeat the jurisdiction of the court, dependent on facts not apparent in the record, and of which the court cannot take judicial notice, must be supported by affidavit or other satisfactory evidence, copies of which must be served on the opposing counsel.

IV.

No oral arguments will be heard on motions, except in such instances as the court may direct.

V.

The clerk, upon filing a motion, shall number and note the same in a docket to be known as the Motion Docket, together with the name of the attorney who makes the motion, and the kind of motion made. Any answer to said motion shall be filed, and shall in like manner be numbered and noted in the Motion Docket, together with the name of the attorney opposing such motion.

VI.

There shall be no oral argument on motions for rehearing, unless such argument is requested by the court.

VII.

No motion for rehearing shall be amended, except by leave of the court.

RULE 4.—BRIEFS AND ARGUMENTS.**I.**

For the appellant or plaintiff in error, and for the appellee or defendant in error, there shall be filed six copies of a brief with the clerk of the court, which shall be either printed or typewritten; and all briefs in civil causes, when printed, shall be in pica type, on white paper, not to exceed in length nine and one-eighth inches, and in width six inches, with an unprinted margin of one and two-eighths inches. Typewritten briefs shall be of the same size, plainly legible, and shall not exceed second impression copies. All briefs shall be in pamphlet form and with covering.

II.

Such brief shall contain, in the following order and separately stated:

1. A concise statement of the case, presenting succinctly the questions involved and the manner in which they are raised.
2. An assignment of the errors relied upon.
3. The argument, exhibiting a clear statement of the points of law, or facts to be discussed, under each assignment of error relied upon, with a reference to the folios of the abstract of the record that are pertinent thereto, and the authorities relied upon in support thereof.

III.

The brief of the appellee, or defendant in error, shall be of a like character with that required of the appellant, or plaintiff in error, except that no assignment of errors shall be required, and no statement of the case, unless that presented by the appellant, or plaintiff in error, is contraverted.

IV.

Whenever an appellant, or plaintiff in error, is in default, the appeal, or writ of error, may, on motion, be dismissed; and whenever an appellee, or defendant in error, shall be in

default, he will not be heard, except on consent of his adversary, or by request of the court.

V.

Within thirty days next after the appeal, or writ of error is perfected, and the statement of facts and bill of exceptions have been made a part of the record in the cause the appellant shall serve upon the attorney of the opposite party a copy of his brief, prepared in conformity with subdivision II of this rule; and within thirty days next thereafter counsel for the appellee, or defendant in error, shall serve upon the counsel for appellant, or plaintiff in error, a copy of his answer thereto; and within fifteen days next thereafter the counsel for the appellant, or plaintiff in error, shall serve upon the counsel for appellee, or defendant in error, his reply thereto, if one be filed.

VI.

Six copies of these briefs, when so made and served, shall forthwith be filed with the clerk of this court.

VII.

If the time given by subdivision V of this rule, in which to make, serve and file such briefs, will not expire before the first day of the term of this court to which the appeal, or writ of error, is returnable, then in every such case, either party to such appeal, or writ of error, may serve the other with written notice that such appeal, or writ of error, will be urged to a submission at the term to which it is returnable; in which event counsel for appellant, or plaintiff in error, shall make and serve his brief, as hereinbefore required, within fifteen days next after the service of such written notice; and counsel for appellee, or defendant in error, shall have a like time thereafter in which to make and serve his answer; and counsel for appellant, or plaintiff in error, shall have five days next thereafter in which to make and serve his reply. And in all such cases, six copies of such brief, answer and reply shall be filed with the clerk of this court not later than the day succeeding that on which said reply is due to be served, unless

such day shall fall on a holiday, and in that event the same shall be filed on the day following.

VIII.

If any brief, answer or reply, shall not be served or filed as hereinbefore provided, the court may, on motion, strike such brief, answer or reply, from the files of the court, and consider and decide the cause as though such defaulting party had made no appearance, or may, in a proper case, dismiss the appeal, or writ of error, for want of due prosecution.

IX.

In all causes where the briefs hereinbefore provided for shall have been duly served and filed, either party will be heard orally for such time as may be fixed by the court, not to exceed one hour, unless special reasons for additional time shall be given to the court and such additional time granted by the court on the day when the calendar is called and the cause set for argument.

RULE 5.—SERVICE.

Attorneys and guardians *ad litem* in the court below will be deemed attorneys and guardians *ad litem* of the same parties in this court until a substitution of record is made, and service of notices, briefs, and all papers, may be made on the attorneys or guardians *ad litem* of record in the court below, until such substitution is made and notice thereof given to opposing counsel.

RULE 6.—DIMINUTION OF RECORD.

For the purpose of correcting any error or defect in the transcript, either party may suggest the same in writing, and upon good cause being shown, obtain an order that the proper clerk certify to this court the whole or any part of the record required, or he may produce the same duly certified, without such order. If the attorney of the adverse party be absent, or the fact of the alleged defect be disputed, the suggestion, except when a certified copy of the omitted record is produced

at the time, must be accompanied by an affidavit showing the existence of the defect alleged.

RULE 7.—ASSIGNMENT OF ERRORS.

I.

All assignments of errors must distinctly specify each ground of error relied upon, and the particular ruling complained of. If the particular ruling complained of has been embodied in a motion for a new trial with other rulings, or in any motion, or in a bill of exceptions, or in a statement of facts, or otherwise in the record, it must nevertheless be referred to in the assignment of errors, or it will be deemed to be waived.

II.

If the assignment of error be, that the court overruled a motion for a new trial, and the motion is based upon more than one ground, the same will not be considered as distinct and specific by this court, unless each ground is separately and distinctly stated in the assignment of errors.

III.

An objection to the ruling or action of the court below, will be deemed waived in this court, unless it has been assigned as error, in the manner above provided.

IV.

If the assignment of error be to the giving of instructions to the jury by the lower court, the appellant must state wherein the instruction complained of is erroneous in its statement of the law applicable to the case or to any particular fact or facts thereof.

V.

If the refusal to give an instruction asked for by the appellant in the court below, be assigned as error, the assignment must state the applicability of such instruction to the fact or facts of the case.

VI.

Assignments of errors shall not be amended in this court.

RULE 8.—COSTS.

Costs shall be allowed to the successful party by this court as follows: For transcript of the record, the amount paid therefor to the clerk of the district court from which the transcript comes, and the expense of printing or typewriting the copies thereof; the costs of the clerk of this court; and the sum of one dollar per page of the briefs and abstract of record of the successful party, not exceeding twenty dollars for the briefs in any one cause.

RULE 9.—APPEARANCE FEE.

In all civil causes the appellant, or plaintiff in error, shall deposit with the clerk of this court twenty dollars, and the appellee, or defendant in error, ten dollars.

The clerk will not be compelled to docket any cause, nor to file any paper until such appearance fee is paid. As soon as the costs of either party exceed the amount deposited by him, the clerk of this court may call upon such party to make an additional deposit of a like amount, and until such additional amount be deposited, the clerk will not be compelled to file any paper, or do any other thing in said cause for the party so in default.

RULE 10.—FILES.

No paper shall be taken from the office of the clerk of this court except by an order of the court.

RULE 11.—MANDATE FROM UNITED STATES
SUPREME COURT.

Upon the receipt by the clerk of this court of a mandate from the Supreme Court of the United States in any cause brought to this court on appeal, or writ of error, and taken

from this court by appeal, or writ of error, to said Supreme Court, it shall be the duty of said clerk, forthwith, to issue under his hand and the seal of this court a remittitur to the district court of the district and county in which the judgment was rendered, commanding such court to take such action in the premises as by the mandate shall be proper, and said remittitur shall also contain therein a recital *in haec verba* of the said mandate; and all the costs subsequent to the appeal from said district court shall be taxed in said remittitur.

Approved March 20th, 1903.

(Signed)

EDWARD KENT, C. J.

RICHARD E. SLOAN, A. J.

FLETCHER M. DOAN, A. J.

GEO. R. DAVIS, A. J.

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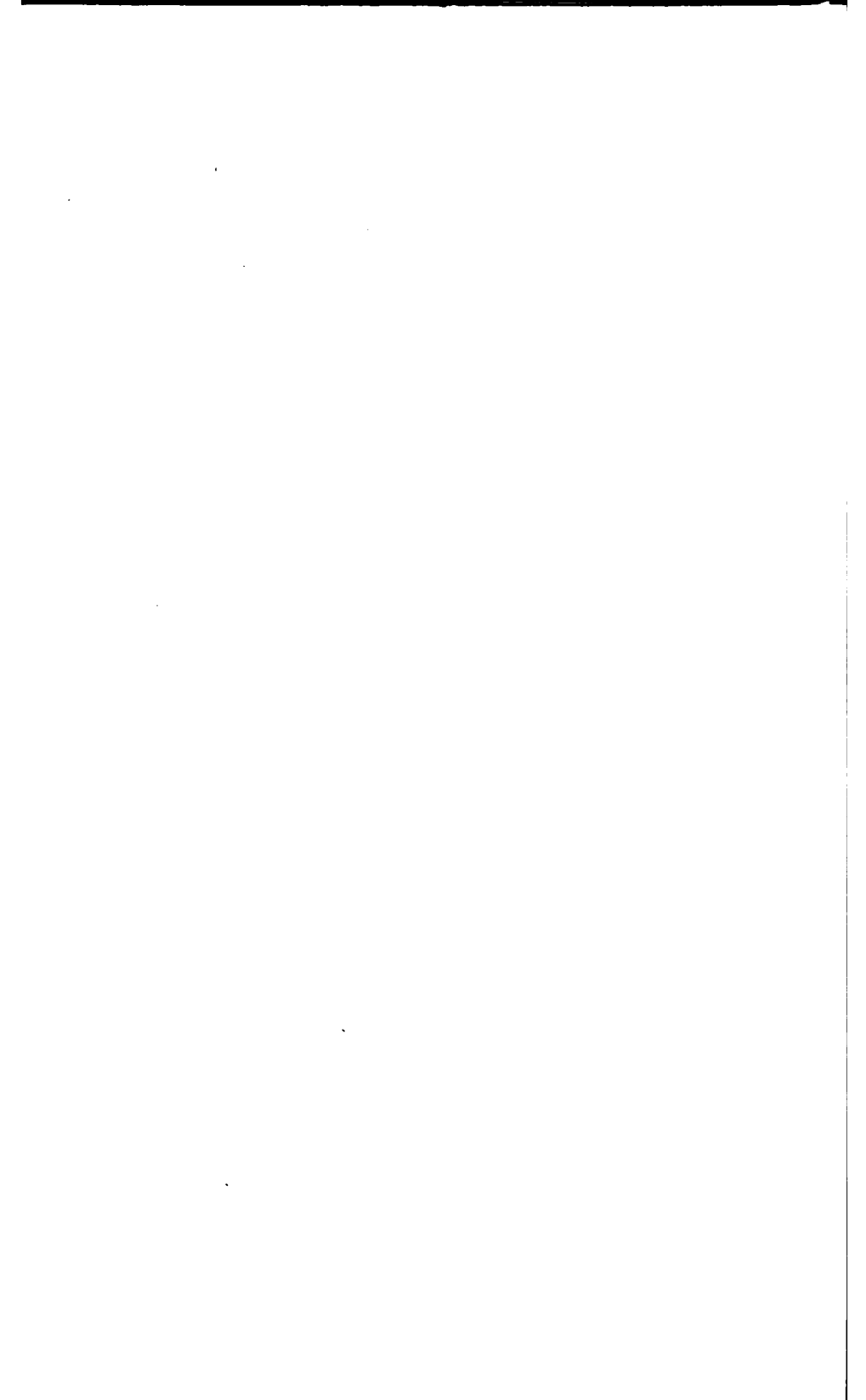
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REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
TERRITORY OF ARIZONA
DURING THE YEAR 1902

[Civil No. 780. Filed March 18, 1902.]

[68 Pac. 543.]

DE MUND LUMBER COMPANY, Defendant and Appellant, v. WILLIAM H. STILWELL, Plaintiff and Appellee.

1. **ATTORNEY AND CLIENT—LEGAL SERVICES—FEES—ACTION—MOTION TO DISMISS.**—In an action by an attorney to recover for legal services, a motion to dismiss, made at the close of the plaintiff's case, upon the ground that there was no evidence against the defendant, is properly denied where the record shows that the allegations that the defendant employed plaintiff as attorney, that plaintiff rendered such services, and that such services were reasonably worth two hundred and fifty dollars, were supported by the direct testimony of the plaintiff, and that there was additional testimony as to the value of the services.
2. **APPEAL AND ERROR—JUDGMENT—FINDINGS—EVIDENCE—CONFLICT—REVIEW.**—The findings and judgment of the lower court based on conflicting testimony, there being substantial evidence to support them, will not be disturbed on appeal.
3. **SAME—ASSIGNMENT OF ERROR—SUFFICIENCY—SUPREME COURT RULE No. 6.**—An assignment of error, that the court erred in denying the defendant's motion for a new trial without stating the grounds on which the motion was based, is insufficient to raise the question of the correctness of the ruling, it not being in compliance with supreme court rule No. 6.
4. **SAME—SAME—REVIEW—SCOPE.**—The appellate court will only examine the record to see that the judgment follows the pleadings, upon an assignment of error that the judgment is contrary to the law, without stating wherein it is so contrary.

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1. **ATTORNEY AND CLIENT—LEGAL SERVICES—FEES—ACTION—MOTION TO DISMISS.**—In an action by an attorney to recover for legal services, a motion to dismiss, made at the close of the plaintiff's case, upon the ground that there was no evidence against the defendant, is properly denied where the record shows that the allegations that the defendant employed plaintiff as attorney, that plaintiff rendered such services, and that such services were reasonably worth two hundred and fifty dollars, were supported by the direct testimony of the plaintiff, and that there was additional testimony as to the value of the services.
2. **APPEAL AND ERROR—JUDGMENT—FINDINGS—EVIDENCE—CONFLICT—REVIEW.**—The findings and judgment of the lower court based on conflicting testimony, there being substantial evidence to support them, will not be disturbed on appeal.
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4. **SAME—SAME—REVIEW—SCOPE.**—The appellate court will only examine the record to see that the judgment follows the pleadings, upon an assignment of error that the judgment is contrary to the law, without stating wherein it is so contrary.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Affirmed.

The facts are stated in the opinion.

Chalmers & Wilkinson, for Appellant.

E. W. Lewis, for Appellee.

DOAN, J.—The appellee, William H. Stilwell, brought suit against the De Mund Lumber Company in the district court of Maricopa County to recover seven hundred and fifty dollars alleged in the complaint to be the reasonable value of legal services rendered to the said company at its special instance and request. Upon the trial of the case before the court without a jury, the defendant, at the close of the plaintiff's evidence, moved the court to dismiss the action on the ground that there was no evidence against the defendant. After the denial of this motion and the introduction of the evidence for the defendant, the court found that the defendant, on or about July 30, 1900, employed the plaintiff as attorney to render certain professional services; that the plaintiff rendered such services to the defendant; that it had not paid for the same; that the services thus rendered were worth two hundred and fifty dollars, and gave judgment for the plaintiff against the defendant for that amount and costs of suit. From this judgment and the denial by the court of a motion for a new trial the defendant appeals, and assigns the following errors: "That the court erred: (1) In denying the motion of the defendant, made at the close of plaintiff's case, to dismiss the action on the ground that the evidence did not show that any services had been rendered the defendant; (2) In finding that the defendant employed the plaintiff as attorney; (3) In finding that such services of plaintiff were rendered to defendant, and that it had not paid for the same; (4) In finding that the services rendered by the plaintiff to defendant were worth the sum of \$250; (5) In denying the defendant's motion for a new trial."

Upon examining the record we discover that the allegations that the defendant employed the plaintiff as attorney, and

that such services were rendered by the plaintiff to the defendant, and that such services were reasonably worth the sum of two hundred and fifty dollars, were each and all of them supported by the direct testimony of the plaintiff in the case, and that there was additional testimony as to the value of the services. This furnished ample ground for the denial by the trial court of the motion to dismiss the action, made at the close of the plaintiff's case. The defendant, after the denial of this motion, introduced evidence to controvert that of the plaintiff relative to the employment of the plaintiff by the defendant, and also in regard to the rendition of the services and their value. But at the close of the case the issues were submitted to the court on contradictory and conflicting evidence. The record presents direct and substantial evidence to support the findings of the court in each instance cited in the assignments of error, and, in accordance with the rule that we have uniformly followed in such cases, the findings and judgment of the lower court having been based on conflicting testimony, and there being substantial evidence to support them, this court will not disturb them.

This disposes of the errors assigned, except the denial of the motion for a new trial. The assignment of this error does not meet the requirements of a proper assignment of error, inasmuch as it simply refers to the ruling of the court on the motion for a new trial, and does not state the grounds on which the motion was based, as required by rule 6 of this court (2 Ariz. 35 Pac. vii). We have examined the motion as contained in the record, and find that, in addition to the errors complained of in the other assignments, it is therein alleged that the court erred in refusing to admit testimony offered by the defendant. An inspection of the record fails to show any such refusal by the court. The transcript only shows one objection made to the evidence offered by the defendant, and that was overruled by the court. It was again urged in the motion for a new trial that the court erred for the reason that the evidence does not support the judgment, and that the judgment is contrary to the evidence and contrary to the law. It is not stated wherein the judgment is contrary to the law. The record convinces us that the judgment follows the pleadings, and that is as far as we may examine the record under this specification. We have prac-

tically covered the ground relative to the weight of the evidence in disposing of the former assignments.

We find no error in the procedure of the lower court, the judgment being sustained by the pleadings, and the record disclosing substantial evidence to support the same, and each of the several findings on which it was based. The judgment of the lower court is therefore affirmed.

Sloan, J., and Davis, J., concur.

[Civil No. 776. Filed March 18, 1902.]

[68 Pac. 541.]

JOHN W. DORRINGTON, Plaintiff and Appellant, v. THE
BOARD OF SUPERVISORS OF YUMA COUNTY,
Defendant and Appellee.

1. **MANDAMUS—WHEN ISSUED.**—*Mandamus* will only issue to compel the performance of an act which the law has specifically enjoined as a duty and which is not in its nature discretionary or judicial; and it may only issue when there is not a plain, speedy, and adequate remedy in the ordinary course of the law.
2. **SAME—COUNTIES—DEMANDS—BOARD OF SUPERVISORS—DISCRETIONARY POWER—OFFICERS—SALARY—REV. STATS. ARIZ. 1887, PARS. 409, 415, CONSTRUED.**—Under paragraph 409, *supra*, forbidding the board of supervisors to allow any demand in favor of any officer who willfully neglects or refuses to perform any of the duties of his office, and empowering it to determine whether the officer presenting a demand is entitled to have the same allowed, and paragraph 415, *supra*, giving a dissatisfied claimant the right to sue the county at any time within six months after the final action of the board, but not afterward, *mandamus* will not lie to compel the board of supervisors to allow the claim of a county officer for salary and expenses, the former statute vesting discretionary powers in the board and the latter providing a plain, adequate, speedy, and exclusive remedy at law.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Yuma. Webster Street, Judge. Affirmed.

The facts are stated in the opinion.

Peter T. Robertson, for Appellant.

That *mandamus* is the proper proceeding to secure the rights of appellant, see Merrill on Mandamus, 13; *Raisch v. Board of Education*, 81 Cal. 542, 23 Pac. 890; *Fowler v. Pierce*, 2 Cal. 165; *Gutherie v. Oklahoma*, 1 Okl. 188, 31 Pac. 190, 21 L. R. A. 841; *Shattuck v. Kincaid*, 31 Or. 379, 49 Pac. 758; *State v. City of Phillipsburg*, 23 Mont. 16, 57 Pac. 405.

W. F. Timmons, for Appellee.

In this case if a writ of *mandamus* was granted it would control the discretion of the board of supervisors, since it commands to allow and denies the discretion to disallow; this cannot be done. *Clune v. Sullivan*, 56 Cal. 249; *Rhodes v. Spencer*, 62 Cal. 43; *Cosner v. Colusa County*, 58 Cal. 274.

SLOAN, J.—The appellant petitioned the court below for a writ of *mandamus* to compel the appellee to audit and pay two demands against the county of Yuma,—one in the sum of nine hundred and twenty dollars, alleged to be due him for salary at the rate of twenty dollars a month from the twenty-fourth day of March, 1895, to the twenty-fourth day of January, 1899, as a member of the territorial board of immigration commissioners of the territory of Arizona in and for the county of Yuma; the other in the sum of nine hundred and twenty dollars, alleged to be due him for and on behalf of moneys expended by him as such commissioner between said dates “in the publication and distribution of information for the edification and enlightenment of persons who might be induced to settle in said Yuma County or make investments therein.” The petition alleges that appellant, on the thirty-first day of May, 1900, filed his said demands duly verified by his oath with the clerk of said appellee, and that on the sixth day of October appellee rejected said demands and refused to audit or allow either of them or any portion thereof, and refused to pay either of them or any portion thereof. Appellee demurred to the petition of appellant, upon the general ground that the facts stated were insufficient to constitute a cause of action against it. Appellee further demurred to the cause of action set up in the petition founded upon the demand for the payment of the

claim made by appellant for his expenditures made by him as commissioner of immigration of said county, upon the ground that the same had not been presented to the board of supervisors within six months after the last item of the account accrued. The court below sustained the demurrer and dismissed the petition. From this judgment the appellant brings his appeal.

The question presented by the general demurrer is, Does *mandamus* lie to compel a board of supervisors to audit and allow a claim for salary or expenses of a public officer? Under the statutes the writ of *mandamus* will only issue to compel the performance of an act which the law has specially enjoined as a duty, and which is not in its nature discretionary or judicial; and it may only issue when there is not a plain, speedy, and adequate remedy in the ordinary course of law. There are many cases which hold that, where the salary of a public officer is regulated by law and made payable at fixed times, the duty of auditing and allowing the claim for such services may be enforced by *mandamus*. The rule laid down in each of these cases is based upon the nature of the duty imposed by statute upon the particular officer or board, there being no element of discretion given, but the duty of auditing and allowing a demand for such salary being made a purely ministerial one. Paragraph 409 of the Revised Statutes of 1887 reads as follows: "No demand on any county treasury shall be allowed by the board of supervisors in favor of any person in any-manner indebted to the county, without first deducting such indebtedness, nor in favor of any officer whose accounts shall not have been rendered and approved, or who shall have neglected or refused to make his official returns, or report in writing, as required by law, or in favor of any officer who shall wilfully neglect or refuse to perform any of the duties of his office. The board of supervisors shall have power to examine, orally or otherwise, on oath, the persons presenting any demand on the treasury, or the agent or attorney of such person, or any other person, in order to ascertain any facts necessary or proper for them to know in order to determine their allowance or disallowance of such demand." It will be observed that by this section it is forbidden the board of supervisors to allow any demand in favor of any officer who wilfully neglects or refuses to perform

any of the duties of his office, and to this end the board is empowered to ascertain the facts to enable it to determine whether the officer presenting a demand is entitled to have the same allowed. To this extent the allowance or rejection of a demand for salary by any county officer is made a quasi-judicial matter, the exercise of which in any particular manner cannot be compelled by *mandamus*. Again, paragraph 415 of the Revised Statutes settles the question of remedy adversely to appellant. Said paragraph reads as follows: "A claimant dissatisfied with the rejection of his claim or demand, or with the amount allowed him on his account, may sue the county therefor at any time within six months after the final action of the board, but not afterward, and if in such action judgment is recorded for more than the board allowed, on presentation of the judgment the board must allow and pay the same, together with the costs adjudged, but if no more is recorded than the board allowed, the board must pay the claimant no more than was originally allowed." The remedy pointed out by this section is plain, no less speedy than the remedy of *mandamus*, and fully as adequate as the latter, inasmuch as the statute specifically enjoins upon the board the allowance and payment of any judgment rendered in such action. Not only this, but we think it was the evident intent of the legislature to require every dissatisfied claimant to bring his action at law against the county to obtain redress where the board has acted to his disadvantage.

It is unnecessary to consider the special demurrer raising the question of the statute of limitations as to the second cause of action, for the reason that we hold that *mandamus* is not the proper remedy in this case, because, first, the rejection of the claim for salary, as also the claim for expenses as immigration commissioner, was, under the statute quoted, the exercise of a judicial discretion, and not the mere refusal to perform a ministerial act; and second, the appellant had a plain, speedy, and adequate remedy specifically pointed out by statute.

The general demurrer to the petition was properly sustained, and the judgment of the court below dismissing the same is therefore affirmed.

Doan, J., and Davis, J., concur.

[Civil No. 764. Filed March 18, 1902.]

[68 Pac. 534.]

CHARLES W. WARTMAN, Plaintiff and Appellant, v. B.
G. PECKA, as Administrator of the Estate of Charles
H. Pierce, Deceased, Defendant and Appellee.

1. ATTACHMENT—DEATH OF DEFENDANT—ABATEMENT—LIEN—FORECLOSURE—REV. STATS. ARIZ. 1887, PARS. 67, 68, 725, CONSTRUED.—Paragraph 67, *supra*, provides that “the execution of the writ of attachment upon any property of the defendant subject thereto . . . shall create a lien from the date of such levy on the real estate levied on. . . .” Paragraph 68, *supra*, provides that “should the plaintiff recover in the suit, the court shall direct . . . the sale . . . of the real estate levied on to satisfy the judgment.” Under these statutes, the attachment proceeding becomes an integral part of the action, and the provisions of paragraph 725, *supra*, providing that an action shall not abate by the death or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue, apply, and embrace the foreclosure of the lien as well as the cause of action.
2. STATUTORY CONSTRUCTION—ATTACHMENT—ABATEMENT—LIEN—NOT DESTROYED BY DEATH—PROBATE ACT—MUST BE CONSTRUED IN LIGHT OF OTHER LAWS—INTENT OF LEGISLATURE MUST BE SPECIFICALLY STATED.—Where the attachment law fixes a lien upon property and points out a method for its enforcement, and the abatement law makes the remedy available, notwithstanding the death of the defendant, the Probate Act must be construed in the light of these laws; and before it should be held that such lien is destroyed by the death of the defendant the legislative intent that this should result should not be inferred from a failure to specifically recognize the continuance of such lien in the probate laws, but it should appear from some positive declaration of the statute.
3. EXECUTORS AND ADMINISTRATORS—DUTIES—DISTRIBUTION OF ESTATE—PRESENTATION OF CLAIMS—ATTACHMENT—FORECLOSURE—PRIORITIES—REV. STATS. ARIZ. 1887, PARS. 1117, 1119, 1176, 1232, CITED AND CONSTRUED.—Paragraph 1117, *supra*, prohibits the bringing of an action against an estate unless the claim is first presented to the executor or administrator, except that an action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint. Paragraph 1119, *supra*, provides that claims must be presented even though action be pending at the time of decedent’s death, and that no recovery shall be had unless proof of such presentation

be made. Paragraph 1176, *supra*, requires executors and administrators, where a sale is made of lands subject to mortgage or other lien, which is a valid claim against the estate, and has been presented and allowed, to apply the proceeds first to the payment and satisfaction of the mortgage or other lien. Plaintiff attached real estate prior to the death of the owner, and after the owner's death amended his complaint asking the foreclosure of his lien, but failed to waive all recourse against other property. *Held*, that the court had no authority to order a foreclosure of the lien by a sale of the property, but should require the payment and discharge of the judgment rendered in due course of administration, giving preference to the attachment lien in case a sale of the real estate is necessary to satisfy the judgment in the order of its priority over other valid liens.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Reversed.

The facts are stated in the opinion.

Thomas D. Bennett, for Appellant.

That the death of the defendant pending suit does not defeat the lien of an attachment theretofore levied, see *Dow v. Blake*, 148 Ill. 76, 35 N. E. 761, 39 Am. St. Rep. 156; *Cochrane v. Loring*, 17 Ohio, 409; *More v. Thayer*, 10 Barb. 258; *Fitch v. Ross*, 4 Serg. & R. 557; *Lord v. Allen*, 34 Iowa, 281; *Mitchell v. Schoonover*, 16 Or. 211, 8 Am. St. Rep. 282, 17 Pac. 867; *Boyd v. Roberts*, 10 Heisk. 474.

Thomas E. Flannigan, for Appellee.

That the death of the defendant destroys the lien of the attachment, see *Myers v. Mott*, 29 Cal. 359, 89 Am. Dec. 49; *Hensly v. Morgan*, 47 Cal. 622; *Ham v. Henderson*, 50 Cal. 367; *Green v. Barker*, 14 Conn. 432; *Kingsbury v. Baker*, 34 Mass. 429; *Vaughan v. Sturtevant*, 7 R. I. 372; *Upham v. Dodge*, 11 R. I. 621; *Collins v. Duffy*, 7 La. Ann. 39; *Phillips v. Ash*, 63 Ala. 414; *Lipscomb v. McClellan*, 72 Ala. 151; *Sweringer v. Elerins*, 7 Mo. 421, 38 Am. Dec. 463; *Kendrick v. Huff*, 71 Mo. 570; *Abernathy v. Moore*, 83 Mo. 65.

SLOAN, J.—The appellant filed an action in the district court of Maricopa County against J. E. Williams and Charles

H. Pierce to recover upon a promissory note. On the same day an attachment was sued out and levied on real estate of the defendant Pierce, situate in the city of Phoenix. The defendant Pierce, who was a resident of the state of Georgia, died before the service by publication of summons was completed. The defendant Williams, after service of summons upon him, did not appear, but suffered judgment by default to be taken against him. The death of Pierce having been suggested to the court, B. G. Pecka, the duly appointed administrator of the estate of said Pierce, was ordered to be substituted as defendant in place of said deceased, and the case to proceed against said administrator. Thereafter appellant amended his complaint, making said administrator party defendant, and praying for the foreclosure of the attachment lien on the real estate levied upon. After trial the court below found that appellant was entitled to personal judgment for the amount sued for against Pecka as administrator of the estate of Charles H. Pierce, deceased, to be paid in due course of administration, and further found "that the lien of said attachment was *ipso facto* by the death of the defendant Pierce dissolved, and this claim against his estate is entitled to no preference thereby." Judgment was entered in accordance with the findings of the court. Appellant appealed from that part of the judgment which holds that the lien of the attachment was dissolved by the death of defendant Pierce, and which ordered the amount recovered to be paid in the due course of administration, without preference.

The appeal in this case raises but one question: Does the death of a defendant after suit brought, and after the levy of an attachment has been consummated upon his property, *ipso facto* dissolve the lien of such attachment? There is a conflict of authority upon this point. This appears to be true, even in states having statutes providing that an action shall not abate, in which the cause of action survives, upon the death of the defendant, and permitting the executor or administrator to be made a party defendant, and the case to proceed against the latter. The question, so far as this territory is concerned, is an open one, and must be determined from a consideration of the attachment law, the Practice Act, and various sections of the probate statutes which bear upon the subject.

Paragraph 67 of the Revised Statutes of 1887 provides that "The execution of the writ of attachment upon any property of the defendant subject thereto, unless the writ should be quashed or otherwise vacated, shall create a lien from the date of such levy on the real estate levied on, and on such personal property as remains in the hands of the attaching officer, and on the proceeds of such personal property as may have been sold."

Paragraph 68 further provides that "Should the plaintiff recover in the suit, the court shall direct the proceeds of the personal property sold to be applied to the satisfaction of the judgment, and the sale of the personal property remaining in the hands of the officer and of the real estate levied on to satisfy judgment."

It will be observed that the former paragraph declares that the execution of the writ of attachment upon the property of the defendant creates a lien from the date of such execution, which remains until "quashed or otherwise vacated." What will vacate the attachment lien is not stated. The latter paragraph provides for the foreclosure of the attachment lien in the action. Our attachment law in this respect follows that of Texas, from whence it came to us. Elsewhere the general rule is that the lien of attachment continues only until it is merged in the lien of an execution under which the property levied upon is sold to satisfy the judgment. Under our statute no execution need be levied upon property held under attachment, and directed by the court to be sold in satisfaction of the judgment, for the order of the court is sufficient warrant to the sheriff or other officer to sell. In this respect the proceeding is analogous to the sale of property under judgment foreclosing a mechanics' lien. The attachment proceeding becomes, therefore, an integral part of the action; and the provisions of paragraph 725 providing that an action shall not abate by the death or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue, apply, and embrace the foreclosure of the lien, as well as the cause of action.

It is urged that, notwithstanding the provisions of the attachment and abatement laws, the death of a defendant before judgment must be held to dissolve an attachment against his property, for the reason that our Probate Act

contains no specific provisions for its enforcement. It was for the latter reason that the supreme court of California, in the case of *Myers v. Mott*, 29 Cal. 359, 89 Am. Dec. 49, which has become the rule of law in that state, held that the death of a defendant pending the action destroys the lien of an attachment levied upon his property, and that the latter passes into the hands of the executor or administrator, to be administered upon in the due course of administration. The decision was reached by a divided court, and the reasoning in the case is far from conclusive. We hold that the Probate Act in this regard should be construed in the light of the attachment and abatement laws. As we have seen, the attachment law fixes a lien upon property, and points out a method for its enforcement; and the abatement law quoted must be construed to make the remedy available notwithstanding the death of the defendant. Before, therefore, it should be held that such lien is destroyed by the death of the defendant, the legislative intent that this should result should not be inferred from a failure to specifically recognize the continuance of such lien in the probate laws, but it should appear from some positive declaration of the statute. The argument in the *Myers* case, carried to its fullest extent, would have the effect of destroying all liens, both voluntary and *in invitum*, the payment and discharge of which are not specifically provided for in the probate court.

An examination of the Probate Act has satisfied us that the power to foreclose an attachment lien remains in the district court, notwithstanding the death of the defendant, and that there is no real difficulty in reconciling the provisions of the Probate Act with this view.

Paragraph 1117 of the Revised Statutes provides that "No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator, except in the following case: An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint; but no counsel fees shall be recovered in such action unless such claim be so presented."

Paragraph 1119 provides that "If an action is pending

against the decedent at the time of his death, the plaintiff must in like manner present his claim to the executor or administrator for allowance or rejection, authenticated as required in other cases; and no recovery shall be had in the action unless proof be made of the presentations required."

The latter section must be read in the light of the former section, and the provisions with reference to the foreclosure of a mortgage or other lien in the former should be read to apply to an action for the foreclosure of such mortgage or lien pending against the decedent at the time of his death. There is no good reason for requiring the presentation of a claim secured by mortgage or lien to the executor or administrator or probate judge where suit has actually been brought thereon, and in which all recourse against any other property of the estate than that covered by said mortgage or lien is expressly waived, than there is in the case where suit is brought after the death of the defendant. Strength is added to this view of the statute when we consider the provision of paragraph 1122, to the effect that, if an execution be actually levied upon any property of the decedent before his death, the same may be sold for the satisfaction thereof, and that the officer making the sale must account to the executor or administrator only for the surplus in his hands. Under the statute an execution lien is of no higher order than an attachment lien, both being liens *in invitum* given for the purpose of enforcing the satisfaction of judgments against the property of judgment debtors. If section 1117 is to be construed as embracing an action pending against the decedent at the time of his death, it follows that, before the plaintiff in any such action may enforce an attachment lien, he must comply with the requirement as to an express waiver of all recourse against any other property of the estate. This he may do, if he so elects, by amending his complaint in that behalf. Should, however, the plaintiff present his claim to the executor or administrator for allowance or rejection, and make no waiver as required in paragraph 1117, then we think there is still ample provision in other sections of the probate act which save to him his attachment lien, to be enforced in due process of administration.

Paragraph 1176 reads as follows: "When any sale is made by an executor or administrator, pursuant to the provisions

of this chapter, of lands subject to any mortgage or other lien, which is a valid claim against the estate of the decedent, and has been presented and allowed, the purchase money must be applied, after paying the necessary expenses of the sale, first to the payment and satisfaction of the mortgage or lien, and the residue, if any, in due course of administration. The application of the purchase money to the satisfaction of the mortgage or lien must be made without delay, and the land is subject to such mortgage or lien until the purchase money has been actually so applied. No claim against any estate which has been presented and allowed, is affected by the statute of limitation pending the proceedings for the settlement of the estate. The purchase money, or so much thereof as may be sufficient to pay such mortgage or lien, with interest, and any lawful costs and charges thereon, may be paid into the probate court, to be received by the clerk thereof, whereupon the mortgage or lien upon the land must cease, and the purchase money must be paid over to the clerk of the court without delay, in payment of the expenses of the sale, and in satisfaction of the debt to secure which the mortgage or other lien was taken, and the surplus, if any, at once returned to the executor or administrator, unless for good cause shown, after notice to the executor or administrator, the court otherwise directs."

It will be observed that the language, "subject to any mortgage or other lien," is quite broad enough to include an attachment lien. The provision in the same paragraph that land "subject to mortgage or other lien" shall not be released from the burden of such mortgage or lien until sold, and the purchase money actually applied to the satisfaction thereof, must control those sections of the statute which regulate the payment of debts and the distribution of the estate. The latter must be construed, so far as a mortgage or lien on real estate is concerned, as providing for the payment of debts out of the general funds in the hands of the executor or administrator available for that purpose, in the order directed by these sections, and not as affecting the rights of a holder of such mortgage or lien by permitting other debts unsecured to have preference, and be first paid out of the proceeds of the property mortgaged, or upon which a lien may have attached, when the latter is insufficient for the pay-

ment of such debts and the full discharge of such mortgage or lien. A mortgage binds property in the hands of an administrator as fully and with the same force and effect as in the hands of the decedent in his lifetime. The provision, therefore, in paragraph 1232, that mortgages shall be paid after the funeral expenses, expenses of the last sickness, and debts having preference by the laws of the United States and of this territory, is not to be construed as limiting the provisions of paragraph 1176, but must be construed as directing merely the payment of debts out of the general funds of the estate in the order named.

In this case, appellant, in his amendment of the complaint, asked for the foreclosure of his attachment lien, but did not expressly waive all recourse against the other property of the estate, if any there be. We do not think, therefore, that the court had authority, under the pleadings, to order a foreclosure of his lien by a sale of the property; but we find that the court had ample authority, and in fact it was its duty, to require the payment and the discharge of the judgment rendered in due course of administration, giving preference to the attachment lien in case a sale of the real estate be necessary to satisfy said judgment in the order of its priority over other valid liens, if any there be.

The judgment of the lower court will be reversed, and a judgment in this court entered in conformity to the judgment of the court below, to the extent of the personal judgment, and which, in addition, will establish the attachment lien on the real estate described in the complaint as of the date of its levy and record, to wit, April 18, 1900, and direct that said judgment shall be paid in due course of the administration of the estate of Charles H. Pierce, deceased, and that said real estate shall be subject to said attachment lien until paid and satisfied out of the general funds of the estate, and, if said general funds be insufficient, then out of the proceeds of a sale of said real estate in the order of the priority of said lien.

Davis, J., and Doan, J., concur.

[Civil No. 765. Filed March 18, 1902.]

[68 Pac. 527.]

In the Matter of the Estate of JAMES ROARKE, Deceased. O. H. CHRISTY, Administrator, Appellant, v. THOMAS ARMSTRONG, JR., APPELLEE.

1. PROBATE COURT—WILL CONTEST—ABSENT HEIRS—APPOINTMENT OF COUNSEL—ALLOWANCE—JURISDICTION—REV. STATS. ARIZ. 1887, PAR. 1290, CONSTRUED.—Under the statute, *supra*, providing that at or before the hearing of petitions and contests for the probate of wills, the court may appoint an attorney for unrepresented heirs, and that such attorney may receive a fee to be fixed by the court for his services, which must be paid out of the funds of the estate as necessary expenses of administration, and upon distribution may be charged to the party represented, the probate court, or the district court on appeal, has authority to fix the attorney's fee and order its payment at any time after the completion of the services for which he was appointed.
2. SAME—SAME—SAME—SAME—SAME—SAME—EX PARTE ORDER—NOTICE UNNECESSARY.—Where an attorney had been appointed under the statute, *supra*, for unrepresented heirs in the contest of probate of a will, an order directing the payment of said attorney's fee may be made *ex parte*, and no notice of entry is required.
3. SAME—SAME—SAME—SAME—VALIDITY—NOT AFFECTED WHERE ONE OF HEIRS IS ALREADY REPRESENTED—REV. STATS. ARIZ. 1887, PAR. 1290, CONSTRUED.—Where an attorney was appointed under the statute, *supra*, for unrepresented heirs, and it appears that one of said heirs is already represented by an attorney of record, such irregularity does not affect the validity of the appointment as relating to the other heirs who are represented solely by him.
4. APPEAL AND ERROR—NATURE OF PROCEEDING—NOT CHANGED BY APPEAL—TRIAL BY JURY—NO RIGHT TO ON APPEAL—WHERE NOT A MATTER OF RIGHT IN ORIGINAL ACTION—REV. STATS. ARIZ. 1887, PAR. 1305, CONSTRUED.—Under the statute, *supra*, requiring that "all causes removed by appeal to the district court shall be tried anew as if originally brought in such court," the nature of the proceeding is not changed by an appeal; and as a jury trial is not a matter of right in the probate court, it is not error for the district court to deny a demand for a jury trial.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Affirmed.

The facts are stated in the opinion.

C. F. Ainsworth, for Appellant.

Joseph H. Kibbey, for Appellee.

That the action of the court in allowing appellee fees for his services in representing absent heirs, was proper, see *In re Rety's Estate*, 75 Cal. 65, 17 Pac. 65; *Cunningham's Estate*, 54 Cal. 556; *Lux's Estate*, 134 Cal. 3, 66 Pac. 30; *Miller v. Gehr*, 91 Md. 709, 47 Atl. 1032; *Leach v. Pierce*, 93 Cal. 627, 29 Pac. 240; *Ford v. Ford*, 88 Wis. 122, 59 N. W. 466.

DAVIS, J.—On October 3, 1898, there was pending in the probate court of Maricopa County an application for the admission to probate of a certain instrument in writing, purporting to be the last will and testament of James Roarke, deceased. By its order of that date the said court appointed Thomas Armstrong, Jr., an attorney, to represent, in said proceeding, the interests of eight absent and non-resident heirs at law of said decedent, named and specified in the order. The estate of said James Roarke was at that time in process of administration in said court as an intestate estate, and was valued at about forty-five thousand dollars. It has since depreciated to about sixteen thousand dollars. The distributive interest of these absent heirs under the law was two thirds of the entire estate. The pretended will, which was offered for probate, purported to give the whole of the estate to a nephew of the decedent, and, if sustained, its effect would be to wipe out the interest in the estate of those whom the appellee had been appointed to represent. Under these circumstances, the appellee, co-operating with counsel employed by the remaining heirs, entered actively upon a legal contest in the probate court against the admission of the alleged will, which was successfully prosecuted, resulting in the instrument being held to be a forgery, and the abandonment of all claims under it. To this contest the appellee devoted about thirty days of his time in the work of preparation, trial, and argument. The case was one in which zeal and industry were displayed on both sides. There were repeated hearings, and in all thirty or more witnesses were examined. On January 29, 1900, some time after the proceeding had been finally terminated, the appellee filed in the

probate court his claim for compensation for services rendered under said appointment, in the sum of four thousand dollars, together with a written notice to the administrator of the James Roarke estate that he would request the allowance of said claim by the court and the payment thereof out of said estate. No objection to the allowance of said claim was ever filed. On December 31, 1900, the said court made and entered, *ex parte*, an order reciting the appellee's appointment as aforesaid, his representation of the absent heirs, the pendency of his claim for compensation, and directing the administrator of the Roarke estate to pay him the sum of four thousand dollars for services as attorney for said heirs. From this order of the probate court allowing the attorney's fee an appeal was taken by the administrator to the district court, where the matter was heard *de novo* at the April term, 1901. In the district court a demand on the part of the appellant for a jury trial was refused, and the cause was tried before the court without a jury. A number of witnesses were examined on the trial, the testimony being mainly directed to the character and value of the services rendered by the appellee for the heirs whom he was appointed to represent in the probate court proceeding. The estimates of value placed upon these services by the witnesses who were examined upon that point ranged all the way from two hundred to five thousand dollars. It was developed on the trial that William Roarke, one of the absent heirs for whom the appellee was appointed to act by the order of October 3, 1898, was at that time already represented in matters before said probate court pertaining to said estate by another attorney of record. The district court rendered judgment in favor of the appellee for the sum of twenty-five hundred dollars, and ordered that the amount be paid by the administrator out of the funds of said estate as expenses of administration, the same to be charged upon final distribution to the parties (except William Roarke) represented by the appellee under his appointment. The administrator now brings this appeal from the judgment of the district court.

It is claimed that the court below erred in rendering any judgment whatever against the administrator for the payment of compensation to the said appellee on the facts shown, for the reason that the probate court had no jurisdiction to

hear, try, and determine the question of the appellee's fee until the estate was ready for final distribution and settlement, and that the district court acquired no jurisdiction on appeal to order and allow compensation to the appellee until the estate was ready for final distribution and settlement in the probate court. The authorization for the payment of an attorney under the circumstances of the case at bar rests upon paragraph 1290 of the Revised Statutes of 1887, which provides as follows: "At or before the hearing of petitions and contests for the probate of wills . . . and other proceedings where all the parties interested in the estate are required to be notified thereof, the court may, in its discretion, appoint some competent attorney at law to represent, in all such proceedings, the devisees, legatees, heirs, or creditors of the decedent, who are minors and have no general guardian in the county, or who are non-residents of the territory; and those interested who, though they are neither such minors nor non-residents, are unrepresented. The order must specify the names of the parties for whom the attorney is appointed, who is thereby authorized to represent such parties in all such proceedings had subsequent to his appointment. The attorney may receive a fee to be fixed by the court for his services, which must be paid out of the funds of the estate as necessary expenses of administration, and upon distribution may be charged to the party represented by the attorney. If, for any cause, it becomes necessary, the probate court may substitute another attorney for the one first appointed, in which case the fee must be proportionately divided." We find nothing in the language of this statute to warrant the construction contended for by the appellant. Its obvious purpose was to guard by suitable representation in the proceedings mentioned the interests of those who would not otherwise be represented therein. It was intended also to aid the court in the proper administration and distribution of the estates of decedents, and is a valid statute. The language of the paragraph is plain and unambiguous. It leaves to the discretion of the probate court, in every case, the question of the necessity and propriety of the appointment of an attorney to act for those parties to any such proceeding who come within the classification of the statute and are without representation. It is likewise discretionary with the court whether

an attorney so appointed shall receive a fee for the services which he renders under the appointment, and, if compensation is to be allowed, the court is required to fix the fee. When so fixed, the statute determines both the manner and the order of its payment in providing that it "must be paid out of the funds of the estate as necessary expenses of administration." Other provisions of law, which are not made the subject of controversy here, govern and control the payment of "expenses of administration." The next following clause, "and upon distribution may be charged to the party represented by the attorney," simply leaves it for the court to decide whether, upon distribution, such party should alone bear the fee. If it developed that the services rendered were for the benefit of the entire estate, probably no such order would be made. In any event, the statute contemplates the previous payment of the fee as "expenses of administration," and unless it had already been actually paid it is difficult to see how it could well be "charged" to the party upon distribution. We cannot, without interpolating language not contained therein, find justification for giving to this statute a construction which would prevent the probate court, in a proper case, from fixing the amount of the attorney's fee in such a matter, at any time after the completion of the services for which he was appointed. The order, too, may be made *ex parte*, and no notice of the entry thereof is required. *Leach v. Pierce*, 93 Cal. 627, 29 Pac. 239. Of course, it would be subject to rehearing and vacation in the probate court, and to review, upon appeal, in the district court. The proceeding in which the appellee was appointed to represent absent and non-resident heirs was properly pending in the probate court. It was a matter connected with the early administration of the estate to which it related. The order of that court fixing the amount of the compensation was not made until about two years had elapsed after the performance of the services. Unquestionably, the probate court had power to make the order when it was made, and the district court jurisdiction to revise it, on appeal.

In his second assignment of error the appellant questions the validity of the order appointing the appellee to act as attorney for absent heirs, on the ground that one of the parties specified in the order (William Roarke) was already

represented by an attorney of record in said probate court. Whether this irregularity proceeded from inadvertence or some other cause, we are unable to see how in any view it could possibly affect the validity of the appointment as relating to the seven other parties named in the order who, as the record shows, were represented in the proceeding solely by the appellee. The distributive share of William Roarke in this estate, as an heir at law, was a sixth portion thereof, and it is more than probable that the error of the probate court in providing unauthorized representation for this interest, and considering it to augment the attorney's allowance, may have had influence in the district court toward reducing the fee to the sum of twenty-five hundred dollars.

It is urged, finally, that the district court erred in denying the appellant's demand for a jury trial in said cause. The point is sought to be made that as the Probate Act (Rev. Stats. Ariz. 1887, par. 1305), requires that "all causes removed by appeal to the district court shall be tried anew as if originally brought in such court," the appeal proceeding takes the nature of an original action in that court for the recovery of attorney's fees against the estate, in which either party would have the right to demand a jury. Such is not the contemplation of the law. The nature of the proceeding is not changed by the appeal, and the matter comes before the district court in no different form from that which it presented in the probate court. It is still the matter of the allowance of a proper fee to an officer of the court for services rendered in pursuance of his appointment, and the statute expressly provides that such fee shall "be fixed by the court." It has been frequently held that the right of trial by jury is secured by the constitution only in cases in which it had previously existed in the administration of justice according to the course of the common law. Probate matters belonged to ecclesiastical jurisdiction, where a jury was not a right.

The findings of the district court in this case are amply supported by the evidence, and, on the whole, we cannot say that there has been any abuse of discretion or error of judgment. The judgment appealed from is accordingly affirmed.

Sloan, J., and Doan, J., concur.

[Civil No. 775. Filed March 18, 1902.]

[68 Pac. 529.]

L. C. SHATTUCK, Plaintiff and Appellant, v. MARTIN COSTELLO, Defendant and Appellee.

1. **MINES AND MINING—ACTION TO QUIET TITLE—PLEADING—GENERAL DENIAL—CROSS-COMPLAINT—FINDINGS.**—In a suit to quiet title to a mining claim, the defendant having answered denying the validity of the plaintiff's location, and by way of cross-complaint having asked that his title to a conflicting location be quieted as against plaintiff, it is the duty of the court to determine the validity of defendant's claim as well as the plaintiff's although the latter only would need to be determined under a general denial.
2. **FINDINGS OF FACT—UPON GENERAL DENIAL—UPON CROSS-COMPLAINT—GENERAL FINDING IN FAVOR OF DEFENDANT INSUFFICIENT.**—Where a defendant merely denies the allegations of plaintiff's complaint a general finding for the defendant will be sufficient; but where the defendant sets up a cross-complaint, and asks for affirmative relief based upon the facts set up in the cross-complaint, a general finding for the defendant is not sufficient, but there should be a special finding of fact upon the cross-complaint upon which a judgment can be founded.
3. **SAME—SUFFICIENCY—UPON CROSS-COMPLAINT—ACTION TO QUIET TITLE—REV. STATS. ARIZ. 1901, PAR. 1406, CONSTRUED.**—The statute, *supra*, requires that "In all cases where a trial of an issue of fact is held by the courts of record . . . the decision of the court shall be in writing . . . and the facts found and the conclusions of law shall be separately stated . . . and judgment . . . entered accordingly." In an action to quiet title to a mining claim, defendant alleging a conflicting location and asking that title be quieted, a finding upon the issues of fact that "the court finds in favor of defendant and against plaintiff, and that the allegations of defendant's cross-complaint are true," is insufficient to support a judgment quieting defendant's title to the premises, but full findings of fact should be made.
4. **MINES AND MINING—LOCATION—VALIDITY—ACTION TO QUIET TITLE—EVIDENCE—BURDEN OF PROOF.**—Where both parties claim certain property as a mining claim, and both seek to have their title quieted, each claiming under a relocation, the burden is on each party to prove the validity of his location, the duty of taking the initiative in such proof resting upon the plaintiff.
5. **SAME—SAME—SAME—DESCRIPTION—BOUNDARIES OF ANOTHER CLAIM—MONUMENTS.**—To name mining claims as the boundaries of a

location is such a reference to natural objects and permanent monuments as to comply with the statute.

6. **SAME—SAME—SAME—SAME—PRESUMPTIONS—EVIDENCE—BURDEN OF PROOF.**—Where mining claims are used in a location notice to designate the boundaries of a claim, the presumption is that such objects exist, and the duty to show that they do not exist is cast upon the disputing party.
7. **SAME—ACTION TO QUIET TITLE—RELOCATION—VALIDITY—PRIOR LOCATION.**—The evidence in an action to quiet title to a mining claim reviewed and held to show that at the time of defendant's location the ground was covered by an existing valid location, and therefore not open to relocation.
8. **SAME—SAME—SAME—SAME—SAME—EVIDENCE—ADMISSIONS—PREMATURE LOCATION.**—Defendant located a mining claim on December 12, 1895. On January 1, 1896, plaintiff located the same claim. Suit having been brought to quiet title, and the issue being whether a prior location was existing at the time of defendant's location, thereby rendering said location invalid, evidence was introduced showing that on January 27, 1900, defendant filed location notices upon the ground in dispute, declaring that they constitute a "relocation of the ground formerly located by unknown parties and abandoned in 1895 or 1896." *Held*, that such filing stands in the nature of an admission by defendant that his location of December 12, 1895, was premature.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. George R. Davis, Judge. Reversed. Dismissed on rehearing, *post*, p. 255.

The facts are stated in the opinion.

Barnes & Martin, for Appellant.

The ground covered by the Henrietta, Triangle, and Leo claims is substantially the same ground. The Henrietta was located in 1893, and was a good, valid, and subsisting location up to December 31, 1895.

The discovery work and discovery monument of the Leo is within the boundaries of the old Henrietta, and at the date of the Leo location, December 12, 1895, it was not open ground, and therefore the Leo location is void. *Belk v. Meagher*, 104 U. S. 279, 26 L. Ed. 735; *Armstrong v. Lower*, 6 Colo. 631; *Faxon v. Bernard*, 4 Fed. 705; *Guilliam v. Donnell*, 115 U. S. 45, 5 Sup. Ct. 1110, 115 L. Ed. 348; *Golden*

T. Co. v. Smith, 2 Dak. 374, 11 N. W. 97; *Harrington v. Chambers*, 3 Utah 94, 1 Pac. 362.

On an adverse suit it should be determined whether or not either party has a right to the land in controversy, and mere failure to make out a case on the part of one of the litigants does not relieve the other from showing his title. *Steel v. Gold Lead etc. Co.*, 18 Nev. 80, 1 Pac. 448; *McGinnis v. Egbert*, 8 Colo. 41, 5 Pac. 653; *Hammer v. Garfield M. etc. Co.*, 130 U. S. 291, 9 Sup. Ct. 548, 32 L. Ed. 964; *Lee Doon v. Tesh*, 68 Cal. 43, 6 Pac. 97, 8 Pac. 621; *Rosenthal v. Ives*, 2 Idaho, 244, (265), 12 Pac. 904; *Anthony v. Jillson*, 83 Cal. 296, 23 Pac. 419; *Becker v. Pugh*, 17 Colo. 243, 29 Pac. 173; *Manning v. Strehlow*, 11 Colo. 451, 18 Pac. 625; *Jackson v. Roby*, 109 U. S. 440, 3 Sup. Ct. 301, 27 L. Ed. 990; *Gwilliam v. Donnel-len*, 115 U. S. 45, 5 Sup. Ct. 1110, 29 L. Ed. 348; *Wolverton v. Nichols*, 119 U. S. 485, 7 Sup. Ct. 298, 30 L. Ed. 474.

While Costello claims under his Leo location of December 12, 1895, his subsequent action of relocating the same ground, and reciting it to be a relocation of ground formerly located by unknown parties and abandoned in 1895 or 1896, is not only an admission that his pretended location of 1895 was not good, but it is a solemn admission that the Moore location of the Henrietta was a valid one. *Belk v. Meagher*, 104 U. S. 279, 26 L. Ed. 735; *Wills v. Blain*, 4 N. Mex. 378, 20 Pac. 798.

Where a statute like ours requires the court to state separately all the facts found and the conclusions of law, the failure of the court to do so is reversible error. Finding under such a statute is in the nature of a special verdict, and without finding such facts there is no basis for the support of the judgment. *Stanzell v. Corning*, 21 Mich. 244; *Hogaland v. Clarey*, 2 Cal. 471.

The findings of the court should consist of a concise and distinct written statement, in its proper order, of each specific fact found. *Emeric v. Alvarado*, 64 Cal. 529, 2 Pac. 418; *Goodnow v. Griswold*, 68 Cal. 600, 9 Pac. 837; *Bahnsen v. Gilbert*, 55 Minn. 334, 56 N. W. 1117.

And the findings must support the judgment. As to the rule in adverse cases, see *Larkin v. Upton*, 144 U. S. 19, 12 Sup. Ct. 614, 36 L. Ed. 330; *McTarnahan v. Pike*, 91 Cal. 540, 27 Pac. 784; *Gelcich v. Moriarity*, 53 Cal. 217; *Pralus v.*

Pacific Gold etc. Co., 35 Cal. 30; *Butte Hardware Co. v. Cobban*, 13 Mont. 351, 34 Pac. 24.

James Reilley, and Ben Morgan, for Appellee.

STREET, C. J.—Appellee Martin Costello filed his application in the land office for a patent to the Leo mining claim, and within the sixty days Francis A. Ovens and L. C. Shattuck filed an adverse, and brought their action in the district court of Cochise County. They set up their title to the Triangle mining claim, and allege that 7.91 acres of the Leo claim overlap the Triangle claim. The Triangle claim being a prior location, they ask that their title to the ground in conflict be quieted, and be declared to be in them, the plaintiffs. The defendant, Costello, answered, denying the validity of the Triangle claim, and, as a cross-complaint, set up the location of the Leo mining claim, praying that he be entitled to the possession of all the Leo mining claim as described in his location notice; and that he be entitled to a patent from the United States, and that his claim be quieted as against the claim of plaintiffs' asserted right to the Triangle claim. The cause was tried to the court, and defendant, Costello, had judgment against L. C. Shattuck upon the following findings of fact: "The court finds from the evidence that the plaintiff Francis A. Ovens died some time during the year 1898, before the commencement of this suit, and before the adverse claim made in plaintiff's complaint was filed in the United States land office in Tucson. As between the plaintiff L. C. Shattuck and the defendant, Martin Costello, upon the issues of fact the court finds in favor of the defendant and against said plaintiff, and that the allegations of defendant's cross-complaint are true." Numerous assignments of error were made, all of which, in effect, were that the findings of fact and the judgment were contrary to the evidence, and also that the findings of fact were too general to base a judgment upon.

The statute provides that "In all cases where a trial of an issue of fact is held by the courts of record of the territory, the decision of the court shall be in writing, and filed with the clerk within thirty days after the trial takes place. In giving the decision the facts found and the conclusions of law shall be separately stated. Judgment upon the decision shall

be entered accordingly." Rev. Stats. 1901, par. 1406. As the issues were made up, it was within the power of the court to find for the appellants, supporting the Triangle claim, or for the appellee, supporting the Leo claim, or for the government, not supporting either of said claims. Had the trial been upon issue raised by general denial, the court would not have been compelled to pass upon the claim of appellee, and the issue would have been only as to the validity of the Triangle claim, and the right of the owners thereof to maintain the same against the government; but, the appellee having set up the Leo claim, and asked for an adjudication of his right to that claim and to a patent therefor, it became the duty of the court to determine the validity of that claim as well as the Triangle claim. Where a defendant merely denies the allegations of plaintiff's complaint, a general finding for the defendant will be sufficient; but where the defendant sets up a cross-complaint, and asks for affirmative relief based upon the facts set up in the cross-complaint, a general finding for the defendant is not sufficient, but there should be a special finding of fact upon the cross-complaint upon which a judgment can be founded. The judgment adjudged "that the defendant, Costello, is the owner of and entitled to the possession of the Leo mining claim, as described in his recorded notice of location thereof, dated December 12, 1895, and in his cross-complaint in this suit, as follows, to wit." Then follows the description, etc. "And it is further ordered, adjudged, and decreed that the title and right of possession of said defendant, Martin Costello, to the said Leo mining claim is forever quieted and confirmed as against the plaintiff L. C. Shattuck," etc. The judgment goes far beyond the findings so prepared. Under the statute, and under defendant's cross-complaint, if the court found in favor of the cross-complaint, full findings of fact should have been prepared and signed, upon which a judgment could have been based. But appellant's assignments of error go further, and say that the findings of fact are unsupported by the evidence, or against the weight of evidence; which leads us into an investigation of the evidence, for, if we should find that the evidence did not present a substantial conflict, but was clearly of such import as to properly support findings in favor of the plaintiffs instead of the defendant, it would be the duty of this court to reverse the judgment.

The Triangle location, claimed by appellants, was located on the first day of January, 1896; the Leo mining location, claimed by appellee, was located on the twelfth day of December, 1895. It is conceded that there is a conflict between the locations to the extent of the 7.91 acres of ground in dispute, but the chief contention between the parties is whether the ground located by appellee on the twelfth day of December, 1895, was at that time open to location; for if the ground was open to location at that time, it is plain that the Leo was a prior location to the Triangle. The dispute centers around a mining claim called the "Henrietta," alleged by the appellants to have been located by S. D. Moore, April 2, 1893, and the ground covered thereby was not open to relocation until the first day of January, 1896, when appellants located it. Both the appellants and the appellee, in proving the validity of their respective mining locations, would have to show that the ground was mineral land open to location, and, if any prior location covered the same ground at the time of either of the locations, such subsequent locations would be void; so the burden of proving the validity of the Triangle location and the validity of the Leo location was cast upon each respectively. It is admitted that the ground covered by each location is mineral ground, but there are no admissions as to the validity of the Henrietta mining claim. It became the duty of the appellants to take the lead in such proof. The description in the location notice of the Henrietta mining claim describes it as located one mile south of the town of Bisbee, and bounded on the north by the Uncle Sam mining claim, on the west by the Iron Prince mining claim, on the south by the Jeff Davis mining claim, on the east by the Tip Top and Woodchopper mining claims. To name mining claims as the boundaries of a location is such a reference to natural objects and permanent monuments as to comply with the statute. The presumption is that such objects exist, and the duty to show that they do not exist is cast upon the disputing party. It is in evidence, however, that the Woodchopper mining claim is a patented mining claim belonging to the Copper Queen Company. Shattuck, in his testimony, says he was acquainted with the ground in dispute; that he had been on it several times; that he knew that Dr. Moore had a claim there, and he knew he had not done his assess-

ment work in 1895, but had done it in 1894; that Dr. Moore had shown him all the monuments, and that he knew them very well; that Moore had taken him all around the claim, and had wanted him to buy in it, and had shown him his lines and monuments; that Moore abandoned the claim in 1895; that he tried to get Shattuck to take all the claims and do the assessment work for a half interest, saying that he was going to allow them to run out in 1895; that Moore did not do any assessment work in 1895, and told witness he was going to abandon it; that the name of the claim was the Henrietta. Witness testified that the Triangle claim is inside of the boundaries of the Henrietta claim; that the Henrietta was too big a claim to come out right; that all the Triangle claim was inside the boundaries of the Henrietta; that he knew the Uncle Sam, the Iron Prince, the Jeff Davis, the Tip Top, and the Woodchopper mining claims, and described how the Henrietta was located in reference to them, as Moore showed him the monuments of the Henrietta. Witness also described the location of the Henrietta monuments in reference to the Triangle monuments. He also said he knew the claim on the ground called the "Leo," and knew the monuments there; that he had seen them; that he was with the surveyor when he surveyed for a patent for the Leo; that he knew the discovery shaft of the Leo on the ground, and that the discovery monument was within the boundaries of the Triangle claim; that he saw the location notice in the monument. Witness also drew on the blackboard a diagram of the Henrietta, the Triangle, the Iron Prince, the Uncle Sam, and the Woodchopper claims, which showed the Triangle and the Henrietta claims to be substantially the same, the Triangle lines coming within the boundaries of the Henrietta. Witness testified that the Henrietta claim joins the end of the Woodchopper claim, but did not quite strike the side lines of the Uncle Sam claim; that Moore had taken him upon the ground two or three different times, wanting him to buy in with him, and at such times showed witness the monuments. Witness testified that he saw the work being done on the Henrietta in 1894; that when Owens located the Triangle claim he knew that the Henrietta had been a location, and that Owens was locating nearly the same ground, and that it was located for the reason that the assessment work had not been done for

1895; that he knew Ovens was a citizen of the United States, and witness had known him for many years; had known Ovens voted at the elections in Arizona; that witness knew Moore was a citizen of the United States; that Moore had told him that he was born in Illinois; that he knew him to be an army doctor and an army surgeon; that Moore was in the territory twelve years, at Bisbee, and practiced medicine there. John Pirrung, a witness, testified that he knew the ground covered by the Iron Prince, the Standard, the Roy, the Triangle, and the Woodchopper claims, and the boundaries of the Triangle claim; that he first knew the Triangle claim in January, 1896; that the ground covered by the old Henrietta claim was located about three or four years prior to the Triangle claim; that Moore claimed to be the owner of the Henrietta; that witness saw a notice of the Roy location inside of the Triangle ground, signed by Martin Costello as the locator and Pat Cunningham as witness, dated December, 1895. George Hill, a witness, testified that he knew the ground included within the location of the Triangle; that he was up there in January and February, 1896; that he went up there to show Dolan a monument on the Standard; that witness saw location notice of the Roy, signed by Costello and Cunningham, inside of the lines of the Triangle. J. A. Rockefeller, a witness, testified that he was a surveyor, and had surveyed the claims known as the "Leo" and the "Roy," and attempted to re-run the old lines of the Henrietta. Witness produced a map, and pointed out monuments of the Leo and the Roy. He testified that he found the center end of the Leo marked in a corner of the Woodchopper claim; that there was a monument of the Tip Top, and it was also marked the Leo and the Roy; that he found a corner of the Leo marked on the center end of the Woodchopper, and in making the official survey the end lines would not be parallel, and he drew the corner in some ninety or ninety-one feet from this point on the line between this corner and this center end of the Woodchopper, which was scribed for the corner of the Leo. In describing further the monuments, witness said, pointing on the map: "I found a location corner probably fifteen feet out from the corner that I established,—that is, corner number three,—just as in the other case, in order to make the claims parallel, and make the claims symmetrical."

Witness gave full descriptions of lines which he ran, all tending to show that the Leo and the Triangle covered the same ground as had been covered by the Henrietta. Defendant, in offering evidence in support of his claim, and in opposition to the offer made by plaintiffs to support their claim, nowhere produced such evidence as would show that the Henrietta had never been a mining claim or a valid location, nor did he show that the assessment work had not been done in 1894.

The result of the evidence produced by the respective parties leads to the conclusion that the Henrietta mining claim was an existing, valid location up until the close of the year 1895; that when Costello made the location of the Leo, December 12, 1895, the ground was not open to relocation, and he could not initiate any rights at that time. No one could initiate a right by an attempted location before January 1, 1896, which was the date of plaintiffs' location. The evidence in regard to these conflicts is not as clear and as distinct as one could desire, but, if the Henrietta is to be regarded as a valid, existing claim (and upon that point we have no doubt), then the evidence more strongly shows that it was a valid, existing claim on the twelfth day of December, 1895, and included ground which is the subject of this conflict, than that it was abandoned or forfeited before 1895. The evidence of witnesses in those particulars, taken in connection with evidence that location notices bearing Costello's name had been recorded for the Leo ground, dated on the twenty-seventh day of January, 1900, with the declaration, "This is a relocation of the ground formerly located by unknown parties, and abandoned in 1895 or 1896; name of former location unknown," leads to the conclusion that the location of January 27, 1900, was the act of the former locator of the Leo for the purpose of strengthening his right to his earlier location. It stands in the nature of an admission by Costello that the location of December 12, 1895, was premature.

The judgment of the district court is reversed, and case is remanded to district court for new trial.

Sloan, J., and Doan, J., concur.

[Criminal No. 161. Filed March 18, 1902.]

[68 Pac. 555.]

W. F. DOWNING, Defendant and Appellant, v. UNITED STATES OF AMERICA, Plaintiff and Respondent.

1. CRIMINAL LAW—ATTEMPT TO ROB MAILS—INDICTMENT—INTENT—SUFFICIENCY—DEFECT OF FORM—CURED BY VERDICT—REV. STATS. U. S., SEC. 5473, AND REV. STATS. ARIZ. 1887, PAR. 1467, CITED AND CONSTRUED.—Section 5473, *supra*, provides that “Any person who shall attempt to rob the mail by assaulting the person having custody thereof, by shooting at him . . . or threatening him with dangerous weapons, and shall not effect such robbery, shall be punishable,” etc. Paragraph 1467, *supra*, provides: “No indictment or information is insufficient, nor can the trial, judgment, or other proceedings thereon, be affected, by reason of any defect or imperfection in matter of form, which does not tend to the prejudice of the substantial rights of the defendant upon its merits.” The indictment charged that defendant “did unlawfully, willfully, and feloniously attempt to rob the United States mail, . . . by then and there assaulting [the custodian] with a dangerous weapon and threatening to kill [said custodian].” The court instructed the jury that the attempt must have been made with an intent to steal, before they could find the defendant guilty. *Held*, that although the indictment might have been held insufficient on demurrer in not alleging the intent with sufficient clearness, yet such insufficiency was a defect of form within paragraph 1467, and cured by verdict.

APPEAL from a judgment of the District Court of the First Judicial District of the Territory of Arizona. George R. Davis, Judge. Affirmed.

The facts are stated in the opinion.

Baker & Bennett, for Appellant.

Robert E. Morrison and Frederick S. Nave, United States Attorneys, for Respondent.

STREET, C. J.—The appellant, William Downing, was indicted, with others, under section 5473 of the Revised Statutes of the United States, which reads: “Any person who shall attempt to rob the mail by assaulting the person having custody thereof, by shooting at him or his horse, or threaten-

ing him with dangerous weapons, and shall not effect such robbery, shall be punishable by imprisonment at hard labor for not less than two years and not more than ten years." The charging part of the indictment, with which we shall have to deal, uses the following language: "Did unlawfully, willfully, and feloniously attempt to rob the United States mail then and there consisting of letters, . . . then and there in the custody of one C. R. McEwen, . . . by then and there assaulting the said C. R. McEwen with a dangerous weapon, to wit, a revolver, then and there loaded and charged with gunpowder and leaden bullet, and threatening to kill him, the said C. R. McEwen; the said defendants then and there not effecting the robbery of the said mail." No demurrer was interposed to the indictment. The defendant pleaded not guilty, was tried, convicted, and sentenced to imprisonment. Before judgment, defendant made a motion for a new trial, and also moved in arrest of judgment, both of which motions were overruled by the court; and the appellant assigns as error that the court erred in overruling defendant's motion in arrest of judgment, for the reason that the facts stated in the indictment do not constitute a public offense, and for the further reason that the facts stated in the indictment are insufficient to support the judgment.

It is argued that the indictment is insufficient, inasmuch as only the overt act is pleaded, without the intent being alleged. Webster gives as the definition for "attempt": "To make an effort to effect some object; to make trial or experiment; to try; to endeavor; to use exertion for any purpose; to attack; to make an effort upon." "Robbery" is defined by the Revised Statutes of Arizona of 1887 to be "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." The skeleton of the indictment is, "Did attempt to rob the mail by assaulting the person." 1 Wharton on Criminal Law, section 190, says: "No doubt it is enough to charge that A did make an assault on B. But the reason is that 'assault' is a term which describes an act easily defined, which asserts a consummated offense, and which is always indictable, no matter in what sense the term may be used. But 'attempt' is a term peculiarly indefinite. It has no prescribable legal meaning. It

relates, from its nature, to an unconsummated offense. It covers acts, some of which are indictable and some of which are not." It is argued by the appellant that the indictment does not make allegation that the assault was made with an intent to rob the United States mail; that the indictment but sets forth the offense in the statutory language; and that there must be not only the allegation of the overt act, but also the allegation of evil intent. Upon this point Wharton (par. 192) says: "It is a familiar principle of criminal pleading that, when an act is only indictable under certain conditions, then these conditions must be stated in the indictment, in order to show that the act is indictable. Nor does it make any difference that the offense is made so by statute. Thus, statutes make indictable revolts, and obtaining goods by false pretense; yet an indictment charging simply that the defendant made a revolt or obtained goods under false pretenses would be scouted out of court. On the same reasoning, in an indictment for an attempt to commit a crime it is essential to aver that the defendant did some act, which, directed by a particular intent, to be averred, would have apparently resulted, in the ordinary and likely course of things, in a particular crime." Appellant also cites the case of *United States v. Carl*, 105 U. S. 611, 26 L. Ed. 1135, to prove the correctness of his theory; and that report, as well as the extract from Wharton, above quoted, supports his contention. "In an indictment upon a statute it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of common law and of other statutes on a like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent." The case of *State v. Lung*, 21 Nev. 209, 28 Pac. 235, 37 Am. St. Rep. 505, also supports appellant's contention. That was a prosecution for an assault with intent to rape, and objection was raised to the indictment that it did not sufficiently describe the elements of the overt act. The court in that case said: "The overt act which constitutes an attempt must be one which manifests

an intention to commit the crime. A man's intentions must be judged by his acts. In attempts his act must have been one which, under all the circumstances, manifests an intention to commit that particular offense. . . . There is no direct allegation that this was done with intent to commit rape. It is argued, however, that as it is alleged that it was done in an attempt to commit rape, and attempt necessarily includes an intent to commit the crime, it follows that the intent is sufficiently stated. At the best, this is merely an argumentative statement of the fact, which is not permissible in an indictment." In the case of *United States v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588, it is said: "It is an elementary principle of criminal pleading that, where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the species; it must descend to particulars." In *United States v. Hess*, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516, it is said: "In an indictment for committing an offense against a statute the offense may be described in the general language of the act, but the description must be accompanied by a statement of all the particulars essential to constitute the offense or crime, and to acquaint the accused with what he must meet on trial." The whole matter seems to be summed up in volume 3 of the *Encyclopedia of Pleading and Practice* (p. 98), where it is said, "Indictments for attempts to commit crimes must aver the intent and the overt act constituting the attempt," and then cites, under that averment, many cases from various states. Now, the very particular and essential element of the attempt which the appellant is accused of making is the intent with which it is done. It is the substance of the thing, just as much as the overt act itself; and we agree with appellant that, if the language in the charging part of the indictment was limited to the language of the statute, there would be an essential element of substance left out,—the element of intent. The intent is not so closely linked with the assault, which is but the means of the attempt, as to make it necessary that the assault was made with the intent; but the intent is so closely linked with the attempt in substance that it is necessary to allege that the attempt was done with the intent. If the stat-

ute was in terms so that it made punishable one who made an assault with an intent to rob the mail, not only the overt act of the assault would have to be alleged, but also there would have to be the allegation of the intent of the assault. The statute, however, under which this indictment is drawn, only speaks of the assault as one of the instruments or means of attempt. In that statute there are two means or instruments mentioned,—one, by assaulting the person; and the other by threatening him with dangerous weapons. This indictment uses the language, “Did unlawfully, willfully, and feloniously attempt to rob the United States mail,” etc., and it is for us to determine whether, in the use of the language “willfully attempt,” there has been such an allegation of substance as would reduce the defects of the indictment to a defect of form, instead of a defect of substance. We have no hesitation in saying that, if the indictment had been attacked by demurrer, a demurrer could have properly been sustained against such allegation. We take it to be the rule that, where a defect is one of form, and not of substance, it is cured by verdict. Paragraph 1467 of the Revised Statutes of Arizona of 1887 provides: “No indictment or information is insufficient, nor can the trial, judgment or other proceedings thereon be affected, by reason of any defect or imperfection in matter of form, which does not tend to the prejudice of the substantial rights of the defendant upon its merits.” The legal definition of “willfully,” as given by the Bouvier Law Dictionary, is “intentional.” So we have the indictment to read, “Did unlawfully, willfully [intentionally], and feloniously attempt to rob the United States mail,”—defective in form, possibly, but good in sufficiency of substance of the necessary averments in the indictment to protect a judgment after plea and trial, however much it might have been open to objection by demurrer; the question for us to solve being, not whether it is bad on demurrer, but whether it is good after verdict. We have authority for holding that it is good after verdict in the case of *Rosen v. United States*, 161 U. S. 29, 16 Sup. Ct. 434, 40 L. Ed. 606. In that case the defendant was indicted under the provisions of the statute making it unlawful to deposit obscene literature in the United States mails. The defendant pleaded guilty, without demurrer, and after verdict of guilty moved the court in arrest of judgment

upon the ground that the indictment did not charge that he knew at the time what were the contents of the paper deposited in the mail and alleged to be lewd, obscene, and lascivious. The court said: "Undoubtedly the mere depositing in the mail of a written paper or other publication of an obscene, lewd, or lascivious character is not an offense under the statute if the person making the deposit was at the time, and in good faith, without knowledge, information, or notice of its contents. The indictment would have been in better form if it had more distinctly charged that the accused was aware of its character. But this defect should be regarded after verdict, and under the circumstances attending the trial, as one of form, under section 1025 of the Revised Statutes, providing that the proceedings on an indictment found by a grand jury in any district court or other court of the United States shall not be affected 'by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.' " That indictment contained the words "unlawfully, willfully, and knowingly deposited and caused to be deposited in the post office," etc., but did not make any charge that he knew what was in the matter so deposited. The court said: "In their ordinary acceptation, the words 'unlawfully, willfully, and knowingly,' when applied to an act or thing done, import knowledge of the act or thing so done, as well as an evil intent or bad purpose in doing such thing; and when used in an indictment in connection with the charge of having deposited in the mails an obscene, lewd, and lascivious paper, contrary to the statute in such case made and provided, should not have been construed as applying to the mere depositing in the mail of a paper, the contents of which at the time were wholly unknown to the person depositing it. The case is therefore not one of the total omission from the indictment of an essential averment, but at most one of an inaccurate or imperfect statement of a fact; and such statement, after verdict, may be taken in the broadest sense authorized by the words used, even if it be adverse to the accused." So in this case we must hold that when the indictment used the language that the defendant "willfully made an attempt to rob the United States mail" there was not a total omission from the indictment of the essential averment of intent, even though it should be neces-

sary to connect the intent with the assault. It is an inaccurate or imperfect statement of a fact, which reduces the defect in the indictment to a defect in form instead of substance, which cannot be taken advantage of after verdict by motion in arrest of judgment.

The court, in its instructions to the jury, charged them specifically that the attempt must have been made with an intent to steal, before they could find the defendant guilty; and further charged them, in reference to the specific intent of the assault, as follows: "I charge you, gentlemen of the jury, that the assaulting of any person having the lawful custody of the United States mail, or threatening him with a dangerous weapon, with intent then and there to rob the mail or to forcibly take it from the possession of such person, such robbery not being completed or effected, constitutes the crime of an attempt to rob the mail, charged in this indictment." Appellant must have understood from the words of the indictment, and the jury must have been fully aware, that the government sought a conviction only in the event that the defendant made the attempt to rob the mail, with evil intent of robbery.

This disposes of the main contention of the appellant. He has assigned as error some instructions given and refused, but, as far as we are able to determine, not having the evidence before us, we cannot see wherein the district court committed error.

The judgment of the district court is affirmed.

Sloan, J., and Doan, J., concur.

[Criminal No. 160. Filed March 18, 1902.]

[68 Pac. 544.]

JUAN ORTEGA, Defendant and Appellant, v. TERRITORY OF ARIZONA, Plaintiff and Respondent.

1. CRIMINAL LAW—INDICTMENT—DUPLICITY—REV. STATS. ARIZ. 1887, PEN. CODE, PAR. 969, AND REV. STATS. ARIZ. 1901, PEN. CODE, PARS. 824, 826, CITED.—Paragraph 969, Penal Code, *supra*, declares

any person to be guilty of a felony "who shall brand and mark or cause to be branded and marked with his brand or any other brand, not the recorded brand of the owner, any animal being the property of another, or who shall efface, deface, or obliterate any brand or mark upon any animal with intent to feloniously convert the same to his own use." Paragraph 824, *supra*, provides: "The indictment must contain: . . . 2d. A statement of the acts constituting the offense in ordinary and concise language." Paragraph 826, *supra*, provides: "The indictment must be direct and certain as it regards . . . 3d. The particular circumstances of the offense charged when they are necessary to constitute a complete offense." An indictment charging that defendant did willfully, unlawfully, and feloniously brand and mark certain cattle with a brand other than that of the real owner, said cattle having been already branded with said real owner's brand, and "did then and there, by so branding, as aforesaid, the cattle aforesaid, deface, alter, and obliterate the said recorded brand of the real owner," while setting forth the details of the act and the attending circumstances with needless particularity, charges only one offense, and substantially conforms to the requirements of paragraphs 824 and 826, *supra*.

2. **SAME—SAME—APPEAL AND ERROR—WAIVER OF OBJECTIONS.**—The objection that an indictment was indefinite because it charged that the offense was committed "on or about" a certain day cannot be entertained on appeal, when no motion to quash was made, and the objection was not raised by the demurrer in the lower court.
3. **SAME—SAME—SUFFICIENCY—TIME—DEFINITENESS—REV. STATS. ARIZ. 1901, PEN. CODE, PAR. 829, CITED.**—Under paragraph 829, *supra*, providing that "the precise time at which the offense was committed need not be stated in the indictment, but it may be alleged to have been committed any time before the finding thereof, except where the time is a material ingredient in the offense," an indictment for unlawfully branding cattle, charging that the offense was committed on or about the first day of March, 1901, and before the finding of the indictment, is sufficient, time not being a material ingredient in the offense.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. George R. Davis, Judge. Affirmed.

The facts are stated in the opinion.

A. Orfila, for Appellant.

C. F. Ainsworth, Attorney-General, for Respondent.

DOAN, J.—Juan Ortega, the defendant in the lower court, and appellant herein, was indicted on the eleventh day of October, A. D. 1901, for violation of section 969 of the Penal Code of Arizona of 1887, charged with branding with a brand, not the recorded brand of the owner, twelve head of neat cattle, the property of Sabino Otero, with intent to convert the said twelve head of neat cattle to his own use, said neat cattle alleged in the indictment to be worth one hundred and fifty dollars. Upon this indictment the defendant was arrested, and on his plea of not guilty was tried and convicted. A motion for a new trial was denied, and the court thereupon adjudged the defendant to be guilty, and on the twentieth day of November, A. D. 1901, sentenced him to imprisonment in the territorial prison for the term of one year from that date. From this judgment and sentence he appeals.

There is no statement of facts, bill of exceptions, or transcript of the evidence presented in this case, and the appeal is sought to be maintained in this court by the production of a copy of the record, as provided by section 1048 of the Penal Code of Arizona of 1901. Nothing appearing in the record indicates any error in the denial of such motion, or furnishes any data to enable this court to review the action of the lower court thereon.

The only question presented in this case by the record and the appellant's brief is the sufficiency of the indictment. The indictment, omitting the heading, is as follows: "Juan Ortega is accused by the grand jury of Pima County, territory of Arizona, by this indictment, found on the 10th day of October, A. D. 1901, of the crime of felony, committed as follows, to wit: The said Juan Ortega, on or about the 1st day of March, A. D. 1901, and before the finding of this indictment, at the county of Pima, territory of Arizona, did then and there willfully, unlawfully, and feloniously brand and mark, and cause to be branded and marked, with the following brand, to wit, J O, said brand not being the recorded brand of Sabino Otero, the true owner thereof, twelve head of neat cattle, the personal property of Sabino Otero, and theretofore branded with the following brand, to wit, S O, said last-mentioned brand being the duly recorded brand of Sabino Otero; and the said Juan Ortega did then and

there, by so branding, as aforesaid, the cattle aforesaid, deface, alter, and obliterate the said recorded brand of the said Sabino Otero so upon said cattle as aforesaid, with the intent upon the part of him, the said Juan Ortega, to feloniously convert to his own use the said twelve head of neat cattle, said cattle then and there being of the value of \$150 lawful money of the United States; contrary to the form, force, and effect of the statute in such cases made and provided, and against the peace and dignity of the territory of Arizona." The appellant calls the attention of this court to three alleged defects in the indictment: 1. That it joins two different offenses in one count,—that it charges that the defendant did "brand and mark," and also in the same count that he did "by so branding . . . deface, alter, and obliterate the said recorded brand"; 2. That the indictment does not state that the defendant branded and marked the cattle with intent to convert the same to his own use; and 3. That the indictment does not state the precise time when the offense was committed. Section 969 of the Penal Code of Arizona of 1887, with a violation of which the defendant is charged, declares any person to be guilty of a felony "who shall brand and mark or cause to be branded or marked with his brand or any other brand, not the recorded brand of the owner, any animal being the property of another, or who shall efface, deface, or obliterate any brand or mark upon any animal with intent to feloniously convert the same to his own use." Sections 824 and 826 of the Penal Code of Arizona of 1901 provide as follows: Section 824: "The indictment must contain, 1st, the title of the action. . . . 2d, a statement of the acts constituting the offense in ordinary and concise language and in such a manner as to enable a person of common understanding to know what is intended." Section 826: "The indictment must be direct and certain as it regards: 1st. The party charged. 2d. The offense charged. 3d. The particular circumstances of the offense charged when they are necessary to constitute a complete offense." In the indictment in this case the statement, in the description of the cattle on which the offense was committed, that they had been "theretofore branded . . . S O, the duly recorded brand of said Sabino Otero," was unnecessary, and could well have been omitted. Its employment, however, rendered proper, if not, indeed,

necessary, the allegation that the defendant did "by so branding as aforesaid the cattle aforesaid, deface, alter, and obliterate the said recorded brand," as a further descriptive statement of "the acts constituting the offense" and "the particular circumstances of the offense charged." While the details of the act constituting the offense and the attending circumstances are, perhaps, set out with needless particularity, the indictment charges only one offense, and substantially conforms to the requirements of sections 824, 825, and 826 of the Penal Code of Arizona.

The text of the indictment fully answers the second objection in the words (which must have escaped the eye of the counsel for appellant) "with the intent on the part of him, the said Juan Ortega, to feloniously convert to his own use the said twelve head of neat cattle."

Third. The appellant urges that "charging that the offense was committed on or about a certain day has been uniformly held to be indefinite, and fatal upon demurrer or motion to quash"; and cites authorities. That is true at common law, and under statutes that require a definite time to be charged in the indictment, but does not avail in the case at bar, for two reasons: First, the record discloses no motion to quash, and this was not urged as ground for demurrer in the lower court, although the demurrer as presented in the record was based on six several grounds, specifically set out, other than the one urged here; second, the offense charged is strictly a statutory offense, and section 829 of the Penal Code of Arizona of 1901 provides: "The precise time at which the offense was committed need not be stated in the indictment, but it may be alleged to have been committed any time before the finding thereof, except where the time is a material ingredient in the offense." In this case it is not contended that the time is a material ingredient in the offense. The indictment alleges that the offense was committed on or about the first day of March, A. D. 1901, and before the finding of the indictment, and the record discloses that this was within the time in which an action may be commenced therefor. This provision of our statute was taken from the California statute, and would be governed by the interpretation given it by the courts of last resort in that state. This same statute is also adopted by the states of Washington, Montana, and Kan-

sas. In all these states it is uniformly held in cases such as the one at bar that the allegation in an indictment that the offense was committed on or about a day specified in the indictment and before the finding thereof is sufficient. *People v. Littlefield*, 5 Cal. 355; *State v. Thompson*, 10 Mont. 549, 27 Pac. 349; *People v. Bidleman*, 104 Cal. 608, 38 Pac. 502; *State v. Williams*, 13 Wash. 335, 43 Pac. 15; *State v. Harp*, 31 Kan. 496, 3 Pac. Rep. 432.

An examination of the record disclosing no error which will warrant a reversal of the case, the judgment of the lower court is affirmed.

Street, C. J., and Sloan, J., concur.

[Criminal No. 157. Filed March 18, 1902.]

[68 Pac. 540.]

LAFE GIBSON, Defendant and Appellant, v. TERRITORY
OF ARIZONA, Plaintiff and Respondent.

1. CRIMINAL LAW—MURDER—CORPUS DELICTI—EVIDENCE—CIRCUMSTANTIAL—SUFFICIENCY.—Defendant knocked decedent down with a ball-club and then struck him over the head. Decedent then succeeded in getting into his wagon and drove about two miles, parties along the way seeing blood on his face and head. The affray occurred about four P. M. of October 23d, and the following morning decedent was found near the roadside in a dying condition, and thereafter and within twenty-four hours of the assault died. There was a dent along the side of his head and another in the back of it. There was a conflict of evidence as to whether defendant struck decedent two or three times. Held, that the evidence was sufficient to establish the death of decedent and the criminal agency of the defendant as the cause thereof.
2. SAME—TRIAL—ARGUMENT—IMPROPER REMARKS OF COUNSEL—HARMLESS ERROR.—A remark of counsel for the prosecution in his opening argument—i. e. "Look at the defendant's face and see that he is a murderer"—is not prejudicial to the defendant where the court upon objection thereto admonishes the offending counsel that his argument must be confined to the evidence in the case, that such a reference to the defendant is improper and must not be indulged in, and also instructs the jury not to consider the reference.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Graham. F. M. Doan, Judge. Affirmed.

The facts are stated in the opinion.

Edwards & McFarland, for Appellant.

C. F. Ainsworth, Attorney-General, for Respondent.

DAVIS, J.—The appellant, Lafe Gibson, was tried at the April term, 1901, of the district court of Graham County, upon an indictment charging him with the murder of one Bacilio Martinez. He was convicted of manslaughter, and sentenced to a term of seven years in the territorial prison. He appeals from the judgment of conviction and from the order denying his motion for a new trial.

It is first urged upon us that the verdict is not supported by the evidence, in this: that the *corpus delicti* has not been proved. We are convinced that the appellant's contention in this regard is without merit. It appears from the evidence that on the twenty-third day of October, 1900, at the village of Eden, the appellant and several younger boys were engaged in playing baseball, when the deceased drove up near them with a two-horse wagon, and called for some one to come to where he had stopped his team in the public road. The appellant and two or three others went to the roadside to inquire of Martinez what he desired, whereupon the latter handed to appellant a piece of paper, with a few words indistinctly written upon it. Martinez was a Mexican, but could speak broken English. When the appellant attempted to unfold and look at the paper, Martinez told him not to do so, and for some cause sought to regain possession of it. The appellant handed him back the paper, and told him to go on. Angry and abusive words passed between the two, when the appellant struck the horses with a willow switch, and started them moving. Martinez quickly stopped the team, jumped down from his wagon, and attempted to pick up a rock lying beside it. The appellant hit him with a ball club as he made for the rock. He struck Martinez on the body, and knocked him to his knees. As the deceased was endeavoring to get to his feet, appellant struck him another blow on the head. There

is some conflict on the point as to whether Martinez received two blows or three. The testimony of four eye-witnesses, however, is conclusive of the fact that once, at least, he was violently struck upon the head with the ball club. Despite his injuries, Martinez succeeded in getting into his wagon and driving away. He traveled in all a distance of two miles after the difficulty. Parties along the way observed some blood upon his head and face. The affray occurred about four o'clock on the evening of October 23d. At about ten o'clock on the following morning Martinez was found near the roadside, in a dying condition. His head and clothing were bloody. There was a dent along the side of his head and another in the back of it. His death occurred between three and four o'clock on the afternoon of October 24th, within twenty-four hours after he had received the injuries at the hands of the appellant. There was no physician, and no autopsy was held. These were the material facts in the case, and we think they sufficiently establish (1) the death of Bacilio Martinez and (2) the criminal agency of the appellant as the cause thereof. The first element of the *corpus delicti* was proved by direct evidence beyond any controversy. That death was produced by the criminal act of the appellant there was strong presumptive evidence. There was the proof of facts and circumstances from which the criminal agency could be justly inferred. The law permits it to be so established, for, as observed by an eminent jurist, "until it pleases Providence to give us means beyond those our present facilities afford of knowing things which occur in secret, we must act on presumptive proof, or leave the worst crimes go unpunished."

The remaining assignment of error is based upon the alleged prejudicial remark of counsel for the prosecution in his opening argument to the jury, when, referring to appellant's personal appearance, he said: "Look at the defendant's face and see that he is a murderer!" Counsel for the appellant objected to this language at the time, as calculated to prejudice the jury against their client, whereupon the court admonished the offending counsel that his argument must be confined to the evidence in the case, and that such reference to the defendant was improper, and must not be indulged in. The court also promptly instructed the jury not to con-

sider the reference which had been made by counsel to the defendant. Manifestly, counsel exceeded the limits of proper argument in thus reproaching the accused; but we think, after all, the offense was chiefly against the dignity of the court, and of that decorum which should always be observed by counsel in a court of justice. It is doubtful whether such misconduct would, under any circumstances, be of aid to the prosecution, and it would generally have the effect to create sympathy for the defendant. In the present case, however, if the objectionable remark could, in itself, have been capable of any possible influence against a fair and impartial trial, its effect must have been entirely neutralized by the action of the court in reproving counsel for the expression, and directing the jury not to consider it. We cannot any more assume that the jury disregarded this instruction than we could assume that it considered evidence which had been ordered stricken out. The record convinces us that the motion for a new trial was properly overruled, and the judgment of the district court will be affirmed.

Street, C. J., and Sloan, J., concur.

[Criminal No. 162. Filed March 19, 1902.]

[68 Pac. 546.]

I. L. QUALEY, Defendant and Appellant, v. TERRITORY
OF ARIZONA, Plaintiff and Respondent.

1. CRIMINAL LAW—CORPORATION—OFFICER FALSIFYING BOOKS—INDICTMENT — SUFFICIENCY — DUPLICITY — REV. STATS. ARIZ. 1887, PEN. CODE, PAR. 881, CITED.—Under paragraph 881, *supra*, providing for the punishment of any officer of a corporation who, with intent to defraud said corporation or its stockholders, destroys, alters, mutilates, or falsifies any of the books, papers, writing, or securities of said corporation, an indictment charging that defendant did “alter, mutilate, and falsify and cause to be altered, mutilated, and falsified a book in writing” belonging to said corporation, and then setting out the one alteration complained of, is good, it being unnecessary to state the name of the person whom the defendant caused to alter the record. While it may have been unnecessary

to have charged the offense as having been done and caused to be done by the defendant, the language used, taken in connection with its context, is not open to the objection that two offenses are therein charged.

2. **SAME—TRIAL—CHARGE TO JURY—SETTING OUT WHOLE STATUTE—SPECIFIC CHARGE—REV. STATS. ARIZ. 1887, PEN. CODE, PAR. 881, CITED.**—Upon the trial of a defendant, president of a corporation, charged with falsifying its records in violation of paragraph 881, *supra*, an instruction to the jury setting out the entire statute is not erroneous where the court elsewhere in its charge specifically stated to the jury the precise charge made against the defendant in the indictment.
3. **SAME—EVIDENCE—ADMISSIBILITY—OTHER ACTS—GOOD FAITH—MOTIVE—REV. STATS. ARIZ. 1887, PEN. CODE, PAR. 881, CITED.**—Upon the trial of a defendant charged with having falsified the records of the corporation, of which he was an officer, in violation of paragraph 881, *supra*, evidence of alterations and erasures in part of the record other than charged in the indictment is admissible as bearing upon the good faith of defendant and tending to establish the motive on his part for the commission of the offense charged.
4. **SAME—SAME—IMPEACHMENT—HARMLESS ERROR—SNEAD v. TIETJEN, 3 ARIZ. 195, FOLLOWED.**—While it may have been erroneous for the court to have sustained objections to questions asked by defendant's counsel, seeking to lay the foundation for impeachment, as to prior conversations by the witness, such error is harmless where the record fails to disclose that defendant offered any impeaching testimony as to such prior conversations.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Graham. F. M. Doan, Judge. Affirmed.

The facts are stated in the opinion.

W. C. McFarland, and J. M. McCullom, for Appellant.

C. F. Ainsworth, Attorney-General, for Respondent.

SLOAN, J.—The appellant was indicted, tried, and convicted for the violation of paragraph 881 of the Penal Code. The charging part of the indictment reads as follows: "I. L. Qualey is accused by the grand jury of the county of Graham, territory of Arizona, duly impaneled and sworn, by this indictment, found this 5th day of October, A. D. 1900, of the crime of felony, committed as follows: The said I. L.

Qualey, who was then and there an officer of a corporation, to wit, president and director of the Arizona and Boston Copper Mining Company, a corporation created, organized, and existing under and by virtue of the laws of the said territory of Arizona, on or about the 28th day of February, A. D. 1900, and before the finding of this indictment, at the county of Graham and territory of Arizona, did then and there, as said officer of said corporation, and while acting as such officer of said corporation, willfully, knowingly, and feloniously alter, mutilate, and falsify, and cause to be altered, mutilated, and falsified, a book in writing belonging to said corporation, to wit, the ledger of the said Arizona and Boston Copper Mining Company, by erasing and altering the figures '2,515.63' after the following words, 'a/c C. A. Qualey,' on page 37 of said ledger, and falsify the same by writing and substituting in lieu thereof the figures '\$50.00,' with intent then and there to defraud said corporation and the stockholders thereof." It is objected that the indictment is bad for two reasons: 1. That the name of the party whom defendant caused to alter, mutilate, and falsify the record in question was not stated; and 2. For the reason that the indictment stated two offenses.

Upon the first ground appellant cites the case of *United States v. Simmons*, 96 U. S. 360, 24 L. Ed. 819. The indictment in the Simmons case charged that the defendant "did knowingly and unlawfully cause and procure to be used a still," etc. The court held the indictment insufficient in the following language: "Since the defendant was not charged with using the still, boiler, and other vessels himself, but only in causing and procuring some one else to use them, the name of that person should have been given. It was neither impracticable nor unreasonably difficult to have done so. If the name of such person was unknown to the grand jurors, the fact should have been stated in the indictment." In this case the charge is that the defendant did "alter, mutilate, and falsify, and cause to be altered, mutilated, and falsified, a book in writing." The distinction between the two indictments is obvious. In the one the defendant was not charged with any act of participation in the offense. In the latter this distinctly appears from the allegations of the indictment. Again, a reading of the indictment discloses that but one

alteration is complained of. The allegation that the defendant altered and caused to be altered the book in question can have relation to but one act of alteration. In a sense, one who does a thing causes it to be done. While it may have been unnecessary to have charged the offense as having been done and caused to be done by the defendant, the language used, taken in connection with its context, is not open to the objection that two offenses are therein charged.

The court, in its charge to the jury, stated the full contents of paragraph 881, under which the indictment was framed. It is urged that this was error, because certain parts of section 881 pertain to kindred offenses not embraced in the indictment. We do not regard this as error, inasmuch as the court elsewhere in its charge specifically stated to the jury the precise charge made against the defendant in the indictment, and the jury could not have been misled, presuming them to have had ordinary intelligence.

A number of errors are assigned raising questions as to the correctness of the court's rulings in the admission or rejection of evidence. Some of these we have already disposed of in passing upon the sufficiency of the indictment. Others are not of sufficient importance to be considered.

It is assigned as error that the court, over objection, permitted the witness A. E. Nelson, an expert bookkeeper, called on behalf of the territory, to testify as to certain erasures and substitutions on another page of the book in which the alteration complained of appears. This evidence clearly bore upon the question of good faith of the defendant in making the alteration complained of, and tended to establish the motive on his part for the commission of the offense charged, and we think was admissible. The defendant sought to lay the foundation for the impeachment of this witness by asking him the following question: "Q. Did you have a conversation with Mr. Birdno in the store of Mr. Soto, that all you wanted to do was to get him indicted?" The objection to this question was put upon the ground that, the testimony of the witness being wholly of an expert character, he was not subject to impeachment in the manner indicated by the question. While we do not think the objection was well taken, the record fails to disclose that the defendant followed up his question by any effort to introduce the testimony of Birdno,

or of any one else, as to whether the statement indicated by the question was or was not made by the witness. The cause ought not to be reversed because a question of this sort was ruled out by the court, unless the record discloses some effort to produce the impeaching evidence, or unless it is proffered in such a way as to make it probable that such evidence was available. For aught that appears in the record, counsel for the defendant may have simply put the question with no intent of introducing impeaching evidence of the character indicated, no matter how the question may have been answered by the witness. It is no answer to this that, the court having ruled the question inadmissible, the foundation for the introduction of the testimony of the impeaching witness was not laid, and therefore it would have been idle to have proffered it. The objection having been made by the territory to the question tending to lay the foundation for the introduction of such evidence, the territory could not have been heard to raise the objection that such foundation was not laid. We think counsel for the defendant should either have stated that he expected to impeach the witness in the manner indicated by the question either by the answer of the witness or by other evidence, or have made proffer of such evidence; and the failure to do either must be taken as showing that the error of the court was harmless. A slight consideration will show the necessity for this. Were this cause reversed and a new trial granted for the reason assigned, there is no showing in the record indicating that the witness would or could be impeached in the manner indicated by the question excluded by the court. The rule is stated in *Snead v. Tietjen*, 3 Ariz. 195, 24 Pac. 324.

We find no error in the record sufficient to reverse the cause, and the judgment of the court below is therefore affirmed.

Street, C. J., and Davis, J., concur.

[Civil No. 762. Filed March 19, 1902.]

[68 Pac. 532.]

PRESLEY D. MOTES, Plaintiff and Appellant, v. GILA VALLEY, GLOBE AND NORTHERN RAILWAY COMPANY, a Corporation, Defendant and Appellee.

1. LIMITATIONS — INJURIES TO PERSON — PLEADING — AMENDMENT — NEW CAUSE OF ACTION — DEPARTURE — REV. STATS. ARIZ. 1887, PAR. 2309, CITED.—The Revised Statutes of Arizona of 1887 (par. 2309) provide that actions for injuries done to the person of another shall be commenced and prosecuted within one year after the cause of action shall have accrued. Plaintiff, on behalf of his minor son, brought an action against defendant to recover damages for personal injury. More than a year after the injury, plaintiff amended his complaint, making the action one for his own benefit. *Held*, that the amended complaint was such a departure from the original complaint as to state a new and different cause of action, and, being filed more than one year after the injury was received, from which it was alleged the damages arose, was barred by the statute, *supra*.
2. SAME — DEFENSE — HOW RAISED — DEMURRER — CONTAINED IN ANSWER — REV. STATS. ARIZ. 1887, PARS. 734, 2328, CONSTRUED.—The Revised Statutes of Arizona of 1887 (par. 2328) provide that "the laws of limitation of this territory shall not be made available to any person in any suit in any of the courts of this territory, unless such be specially set forth as a defense in his answer." Paragraph 734, *supra*, provides that "the defendant in his answer may plead as many several matters, whether of law or fact, as may be necessary for his defense." *Held*, that the only purpose of the former statute is to compel defendant to specially plead the statute of limitations; that it does not prohibit the pleading of the statute by demurrer under the authority of the latter statute.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Graham. F. M. Doan, Judge. Affirmed.

The facts are stated in the opinion.

John McGowan, and J. N. Morrison, for Appellant.

The bar of the statute of limitations cannot be raised by demurrer. Rev. Stats. Ariz. 1887, par. 2328.

It does not appear on the face of either the original or amended complaint that one year had elapsed since the cause

of action accrued; the allegation in each complaint is that the injury was inflicted "on or about" the seventh day of March, 1899. Under this phrase, evidence would be admissible to prove that the injury was inflicted and the cause of action accrued even six months later than the 7th of March, 1899. Therefore, neither of these complaints would be demurrable on the ground that the statute had run, even under a statute making such limitation a ground of demurrer. *District Tp. of Sidney v. Des Moines Ins. Co.*, 75 Iowa, 647, 36 N. W. 902; *Kansas Pacific Ry. v. McCormick*, 20 Kan. 107.

The court erred in sustaining this demurrer, since it nowhere appears in the amended complaint when the original complaint was filed. For aught that appears in the amended complaint, the original may have been filed within an hour after the injuries complained of were received. *Reddington v. Cornwall*, 90 Cal. 49, 27 Pac. 40.

On demurrer to an amended complaint, the original cannot be referred to. *Washer v. Bullitt County*, 110 U. S. 558, 4 Sup. Ct. 249, 28 L. Ed. 249; *Tompkins v. Hollister*, 60 Mich. 470, 27 N. W. 651; *State v. Simpkins*, 77 Iowa, 676, 42 N. W. 516; *Wells v. Applegate*, 12 Or. 208, 6 Pac. 770.

• Frank W. Burnett, for Appellee.

The original complaint sets up a permanent injury to the minor, the father suing in place of the next friend or guardian. The amended complaint shows for the first time loss of minor's services, whereby the father was damaged.

It is clear that these are two distinct actions based upon separate causes of action. A judgment on the original complaint would not bar the action set up in the amended complaint, and *vice versa*. *Rogers v. Smith*, 17 Ind. 323, 79 Am. Dec. 483; Bliss on Code Pleading, 29; *Horgan v. Pacific Mills*, 158 Mass. 402, 35 Am. St. Rep. 504, 33 N. E. 581; *Texas and Pacific Ry. Co. v. Morin*, 66 Tex. 225, 18 S. W. 503; *Karr v. Parks*, 44 Cal. 46; *Dunkee v. Central Pacific R. R.*, 56 Cal. 388, 38 Am. Rep. 59.

The amendment was therefore a departure from the original complaint, and cannot relate back to it so as to prevent the bar of the statute. *Buntin v. Chicago etc. Ry. Co.*, 41 Fed. 744; *Union Pac. Ry. Co. v. Wyler*, 158 U. S. 285, 15 Sup.

Ct. 877, 39 L. Ed. 985; *Neudecker v. Kohlberg*, 81 N. Y. 296; *Van Cott v. Prentiss*, 104 N. Y. 45, 10 N. E. 257; *Hurst v. Detroit C. Ry. Co.*, 84 Mich. 539, 48 N. W. 44; *People ex rel. Gorman v. Judge*, 27 Mich. 138; *Dudley v. Price's Admr.*, 10 B. Mon. 84; *Whalen v. Gordon*, 95 Fed. 305, 37 C. C. A. 70; *Reed v. McConnel*, 133 N. Y. 425, 31 N. E. 22; *Chicago etc. Ry. Co. v. Scanlan*, 170 Ill. 106, 48 N. E. 826; *City of Kansas v. Hart*, 60 Kan. 684, 57 Pac. 938; *Peiser v. Griffin*, 125 Cal. 9, 57 Pac. 690; *Atlanta K. and N. Ry. Co. v. Hooper*, 92 Fed. 820, 35 C. C. A. 24.

STREET, C. J.—On the 6th day of March, 1900, Presley D. Motes, as the father of Presley L. Motes, a minor, filed a complaint in the district court of Graham County against the appellee to recover damages for injuries received by Presley L. Motes on the seventh day of March, 1899, alleged to have been inflicted by carelessness of appellee. The first paragraph of the complaint alleges the residence of the parties; that Presley L. Motes is a minor, and plaintiff is his father; and that, at the time the injury was inflicted, Presley L. was engaged in the occupation of carrying the United States mail from the post-office at Central to the train of appellee. Paragraphs 2, 3, and 4 allege the acts of carelessness on the part of appellee, the injuries received, and the status of the appellee. Paragraph 5 alleges that, by reason of said wrongs and injuries inflicted upon him as aforesaid, said minor, Presley L. Motes, is and has been injured in the sum of three thousand dollars, and prays judgment for that amount. On the 5th of April, 1900, plaintiff amended his complaint, and changed the first paragraph to read that, at the time when the wrongs and injuries were inflicted upon Presley L. Motes by the defendant, he was residing with plaintiff, and with plaintiff's consent, and for plaintiff's use and benefit, was, for a valuable compensation, engaged in the occupation of carrying the United States mail from the post-office at Central to the train of defendant; and also changed the damage clause to read that, by reason of said wrongs and injuries inflicted on said Presley L. Motes as aforesaid, plaintiff has been and is damaged in the sum of three thousand dollars. To the amended complaint defendant demurred, among other reasons, "because said amended complaint alleges a new and

independent cause of action to that set up in the original complaint, and because said new and independent cause of action alleged in said amended complaint accrued more than one year prior to the filing of said amended complaint, and is therefore barred by limitation," which demurrer the district court sustained; and, plaintiff declining to amend, final judgment was rendered for the defendant.

Paragraph 2309 of the Revised Statutes of Arizona of 1887, provides that actions for injuries done to the person of another shall be commenced and prosecuted within one year after the cause of action shall have accrued. The question for this court to determine is, does the amended complaint state a new cause of action, so as to amount to a departure? When a minor child has received an injury under such circumstances that another is liable in damages, two separate and distinct causes of action exist,—one in favor of the child, and another in favor of the parent of the child, for a loss of services, if the child has a parent entitled to his services. By the first complaint it will be seen that an action was sought to be maintained for the benefit of the child, Presley L. Motes; for nowhere in the original complaint is there any statement that the father, Presley D. Motes, has been in any way damaged. In the amended complaint the plaintiff sets up the right to the services of the child, and alleges that he (the father and plaintiff) has been damaged in the sum of three thousand dollars. It is argued by the appellant that there has been no change of "cause of action," and he says that the cause of action set up in the amended complaint is the same cause of action as that set up in the original complaint. As he claims, "the plaintiff's right and defendant's wrong thereto being the only essential elements, the damages and relief logically and necessarily follow." In making amendments to pleadings there may be a departure, not only from fact to fact, but from law to law; and, while it may be true that there has been no departure in the amendment offered by the plaintiff from fact to fact, yet it must be plain that there has been a departure in cause of action from law to law; that is, that the plaintiff first claimed the right to recover for the child for damages to the child on a cause of action in favor of the child, while in his amended complaint he seeks to recover damages for himself for loss of services

of the child, on a cause of action which arose in favor of himself. While each cause of action may depend upon the same facts of injury, they rest upon different rights in law. Steph. Plead., pp. 412, 413, says: "There are cases in which the party deserts the ground in point of fact that he had first taken. But it is also a departure if he puts the same facts on a new ground in point of law." Saund. Plead. & Ev., pp. 806, 807, says: "A departure in pleading is said to be when a party quits or departs from the cause or defense which he has first made, and has recourse to another. A departure may be either in the substance of the action or defense, or the law on which it is founded." In *Bigham v. Talbot*, 63 Tex. 271, it is said: "Where a party declared upon a contract under which he claimed as assignee, and amended so as to rest on a contract which he alleged was made directly with himself, it was held a new cause of action." If the amended complaint is a departure from the original, it must be treated as an original complaint in a new cause of action, and hence would be affected by the statute of limitations. The law in that particular is discussed and stated in *Union Pac. Railway Co. v. Wyler*, 158 U. S. 296-298, 15 Sup. Ct. 877, 39 L. Ed. 983, and may be summarized about as follows: The general rule is that an amendment relates back to the time of the filing of the original petition, so that the running of the statute of limitations against the amendment is arrested thereby. But this rule, from its very reason, applies only to an amendment which does not create a new cause of action. The principle is that, as the running of the statute is interrupted by the suit and summons, so far as the cause of action then propounded is concerned it interrupts as to all matters subsequently alleged by way of amendment which are a part thereof. But where the cause of action relied upon in an amendment is distinct from that originally asserted, the reason of the rule ceases to exist, and hence the rule itself no longer applies. The plaintiff may introduce a new cause of action by amendment; but such amendment cannot have relation to the commencement of the suit, so as to avoid the bar of the statute of limitations, if the statute would operate a bar to a new suit commenced with that cause of action at the time of making the amendment. When the amendment introduces a new right or new matter not within

the *lis pendens* and the issue between the parties, if at the time of its introduction as to such new right or matter the statute of limitations has operated as a bar, the defendant may insist upon the benefit of the statute, and to him it is as available as if the amendment were a new and independent suit.

It is asserted by the appellant that the bar of the statute of limitations cannot be raised by demurrer in any court of justice in Arizona, and he cites paragraph 2328 of the Revised Statutes of Arizona of 1887, which says:

“The laws of limitation of this territory shall not be made available to any person in any suit in any of the courts of this territory, unless such be specially set forth as a defense in his answer.”

We do not regard such provision as an inhibition against pleading the statute of limitations by demurrer. The only purpose of such statute was to declare that the right which one claimed under a statute of limitations should be specially pleaded, and could not be taken advantage of unless it was specially pleaded. Where a complaint reveals a condition which may be pleaded as a defense, such defense may be pleaded in any of the pleas known to our statute.

Paragraph 734 of the Revised Statutes of Arizona of 1887 provides: “The defendant in his answer may plead as many several matters, whether of law or fact, as may be necessary for his defense, and which may be pertinent to the cause; but such pleas shall be stated in the following order and filed at the same time.”

In this case the defendant complied with the statute, in specially pleading the statute of limitations in such a way as to permit a court to pass upon the question; and, being raised so as to give the court the right to determine the relevancy of the statute of limitations to the facts pleaded, we see no error in his exercising that jurisdiction; and we agree with the court that the amended complaint was such a departure from the original complaint as to state a new and different cause of action, and, being filed more than one year after the injury was received from which it was alleged the damages arose, the district court properly sustained the demurrer.

The judgment of the district court is affirmed.

Sloan, J., and Davis, J., concur.

[Civil No. 772. Filed March 19, 1902.]

[68 Pac. 550.]

ARIZONA AND NEW MEXICO RAILWAY COMPANY,
Defendant and Appellant, v. **ROBERT NEVITT,**
Plaintiff and Appellee.

1. **RAILROADS—INJURIES TO PERSONS ON TRACK—EVIDENCE—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR THE JURY.**—Plaintiff and other employees of a reduction works had been accustomed for many years to go along the tracks in the yard of the defendant company. It was not shown that the defendant had given any consent to this use of its right of way, except such implied consent as might be inferred from its suffering this use to be made without objection. Plaintiff, entering upon defendant's right of way, walked along between the tracks passing a switch, where, standing immediately over the frog, was an engine, with one car coupled in front and two behind. When about one hundred and fifty feet north of the engine and cars, plaintiff glanced back and saw that they were standing still. After he had proceeded about one hundred and fifty feet farther, he was knocked down by the car attached to the rear of the engine, while the engine was making what is known as a "flying switch." The wind at the time was blowing from the power-house of the reduction works, and plaintiff stated that he heard no bell and did not notice the noise of an approaching train, but distinctly remembered hearing the noise from the gas-engine at the reduction works. Defendant's rules prohibited the use of the flying switch when it was possible to avoid it, and when it was necessary to use it great caution was required. Making a flying switch requires a very rapid movement of the engine. Plaintiff was an old railroad man, and familiar with the method of making the flying switch. After these facts had been proved, defendant moved to instruct the jury to bring in a verdict for defendant, which motion was overruled. *Held*, that regardless of the question as to whether plaintiff was upon the right of way as a licensee or a mere trespasser, the questions of defendant's negligence and of plaintiff's contributory negligence were both for the jury.
2. **APPEAL AND ERROR—CROSS-APPEAL—ASSIGNMENT OF CROSS-ERROR NECESSARY.**—Objections by appellee cannot be considered without an assignment of cross-error unless the error complained of appears upon the face of the record.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Graham. F. M. Doan, Judge. Affirmed.

The facts are stated in the opinion.

M. J. Egan, and Kibbey & Edwards, for Appellant.

From the standpoint of the appellee, he was only a licensee; and when he entered upon the right of way of this company to walk along its tracks and right of way he took upon himself all the hazards and perils incident to his intrusion thereon. The railroad company had a right to shift its cars from one track to the other in the ordinary operation of its business, and was not bound to modify, delay, postpone, or otherwise change its usual methods for the mere convenience of any one who took upon himself the hazard of walking down those tracks. *Egan v. Montana Central Ry. Co.*, 24 Mont. 569, 63 Pac. 831.

No duty was imposed by law on the defendant any other or greater than they would have owed to a naked trespasser. *Sweeney v. Railroad Co.*, 10 Allen, 368, 87 Am. Dec. 644; *Richards v. Chicago Railway Co.*, 81 Iowa, 426, 47 N. W. 63; *Weldon v. Philadelphia Railway Co.*, 2 Pen. (Del.) 1, 43 Atl. 156; *Settoon v. Texas and P. Ry. Co.*, 48 La. Ann. 807, 19 South. 759.

The following cases hold that owners of private property are not required to provide against danger of accident, but of course could not wantonly injure any one: *Sweeney v. Old Colony R. R. Co.*, 10 Allen, 373, 87 Am. Dec. 644; *Hickey v. Boston L. and R. Co.*, 14 Allen, 429; *Philadelphia etc. R. R. Co. v. Hummell*, 44 Pa. St. 375, 84 Am. Dec. 457; *Gillis v. Pennsylvania R. Co.*, 59 Pa. St. 129, 98 Am. Dec. 317; *Finlayson v. Chicago B. and Q. R. Co.*, 1 Dill. 579, Fed. Cas. No. 4793.

A railroad company is bound to exercise proper care to avoid striking a trespasser on its track *after its servants know such trespasser is in danger*, but the company is not bound to keep a lookout for the benefit of trespassers. *Scheffler v. Railroad Co.*, 32 Minn. 518, 21 N. W. 711; *Planz v. Boston and A. R. Co.*, 157 Mass. 377, 32 N. E. 356; *Brown v. Lynn*, 31 Pa. St. 510, 72 Am. Dec. 768; *Isbell v. New York etc. R. R. Co.*, 27 Conn. 393, 71 Am. Dec. 78; *Baltimore Traction Co. v. Wallace*, 77 Md. 435, 26 Atl. 518; *Louisville etc. R. R. Co. v. Kellum's Admx.*, 14 Ky. Law Rep. 734, 21 S. W. 230; *Curry v. Chicago etc. R. R. Co.*, 43 Wis. 665; *Hepfel v. St. Paul etc. Ry.*, 49 Minn. 263, 51 N. W. 1049; *Haden*

v. *Sioux City etc. R. R. Co.*, 92 Iowa, 226, 60 N. W. 537.

Edwards & McFarland, for Appellee.

When the community for years had been accustomed to use this right of way as a foot-path without objection, the railroad company is chargeable with notice of such usage; at least, its consent is clearly inferable. In such cases there arises on the part of the railroad company a duty to use all reasonable care and diligence to prevent injury to persons who are likely to be on its right of way. *Hansen v. Southern Pacific Co.*, 105 Cal. 379, 38 Pac. 957; *Cahill v. Chicago etc. Ry. Co.*, 74 Fed. 285, 20 C. C. A. 184; *Roth v. Union Depot Co.*, 13 Wash. 525, 43 Pac. 641, 44 Pac. 253, 31 L. R. A. 855; *Young v. Clark*, 16 Utah, 42, 50 Pac. 832; *Barry v. New York Cent. etc. R. R. Co.*, 92 N. Y. 289, 44 Am. Rep. 377; *Byrne v. New York Cent. etc. R. R. Co.*, 104 N. Y. 362, 58 Am. Rep. 512, 10 N. E. 539; *Whalen v. Chicago etc. Ry. Co.*, 75 Wis. 654; *Johnson v. Lake Superior etc. Co.*, 86 Wis. 64, 56 N. W. 161; *Connell v. Chesapeake O. Ry. Co.*, 22 Ky. Law Rep. 501, 58 S. W. 374; *Tutt v. Illinois Cent. Ry. Co.*, 104 Fed. 741, 44 C. C. A. 320.

The testimony showed that the approaching cars had no brakeman upon them; that no warnings were given; that no means were taken to avoid collisions with persons who might be expected to be found upon the tracks or right of way of the appellant. Under such circumstances, it was proper for the jury to determine whether such management was negligence. *Mt. Adams etc. Ry. Co. v. Lowery*, 74 Fed. 463, 20 C. C. A. 596; *Travelers' Ins. Co. v. Randolph*, 78 Fed. 754, 24 C. C. A. 305; *Thompson v. Northern Pacific Ry. Co.*, 93 Fed. 384, 35 C. C. A. 357; *Richardson v. Swift & Co.*, 96 Fed. 699, 37 C. C. A. 557; *Tutt v. Illinois Cent. Ry. Co.*, 104 Fed. 741, 44 C. C. A. 320; *S. C. and Pac. Ry. Co. v. Stout*, 84 U. S. 657, 21 L. Ed. 745; *Phoenix Mutual Life Ins. Co. v. Doster*, 106 U. S. 30, 1 Sup. Ct. 18, 27 L. Ed. 65; *Jones v. East Tennessee etc. Ry. Co.*, 128 U. S. 443, 9 Sup. Ct. 118, 32 L. Ed. 478; *Chicago B. and Q. R. R. Co. v. Gunderson*, 174 Ill. 495, 51 N. E. 708.

SLOAN, J.—Robert Nevitt, the appellee herein, brought

suit in the district court of Graham County against the Arizona and New Mexico Railway Company, a corporation, appellant herein, to recover damages for personal injuries alleged to have been received by him by being struck and knocked down by a train belonging to and being operated by said railway company while he (appellee) was walking between two tracks upon appellant's right of way. It is charged in the complaint that the employees of appellant wantonly, recklessly, and willfully, and without giving appellee any warning whatever of the approach of said train, and while making what is commonly known as a "flying switch," ran him down, and inflicted the injuries complained of. It is shown by the record that at the October, 1900, term of court a trial of the action was had, and a verdict and judgment rendered against the appellant in the sum of fifteen thousand dollars. A motion for a new trial was made by appellant, which was granted. Upon the new trial of the action, after the appellee had introduced his evidence, the appellant moved the court to instruct the jury to return a verdict for it, which motion was by the court overruled. The case then went to the jury under the instructions of the court, without the introduction of any evidence on the part of the appellant. The jury rendered a verdict against the appellant in the sum of three thousand dollars, and judgment was thereupon entered thereon. Appellant moved the court for a new trial, which motion was denied, whereupon this appeal was taken.

Three assignments of error are alleged by appellant. Counsel for appellant, in their brief, chose to discuss questions raised by these several assignments under the one assignment that the court erred in refusing to instruct the jury to return verdict for appellant. The material facts put in evidence by the appellee are substantially as follows: The appellant owns and operates a narrow-gauge railroad from the town of Lordsburg, in New Mexico, to and beyond the town of Clifton, in the county of Graham, in this territory. It was in the town of Clifton that the accident occurred, and near the company's depot building, and within the railroad yards at that place. At the time of the accident, which was in the early morning, the plaintiff was going from his house in the southern portion of the town of Clifton, in a northerly direc-

tion, to the reduction works of the Arizona Copper Company, where he was employed. It was shown that, while there was a public highway leading from the part of the town where appellee lived to said reduction works, for many years it was the custom of the appellee and other employees of said reduction works to go up and down, along, over, and across the tracks in the said yard and right of way of the railroad company. It was not shown that the railroad company had given any consent to this use of its right of way and tracks, except such implied consent as might be inferred from their suffering this use to be made of the same without objection. The appellee testified that he entered upon the right of way of the railroad company at a point about one hundred and sixty feet south of the depot, and proceeded in a northerly direction between two of the tracks of the yard designated as "Track No. 2" and "Track No. 3." The distance between these two tracks, measured between the rails, was about seven feet. He stated that as he approached the depot he passed to the right of the frog that connected track No. 2 and track No. 3. Standing immediately over the frog was an engine, headed south, with one car coupled on the front and two behind. The engine was at the time standing still, almost directly over the frog which connected track No. 3 and track No. 2. After passing the engine, he proceeded along the footpath between the two tracks on his way north. The wind at the time was blowing from the direction of the powerhouse of the reduction works. On the main track, and in front of the depot, a train was then standing, which was due to leave for Lordsburg at that hour. Appellee was walking, as he states, at a rapid pace. After he had passed the engine a distance of one hundred feet, he met a Mr. Schumann, and passed to the right of him, and continued to walk between tracks 2 and 3. He stated that as he passed the depot he saw a number of people passing in and out. Shortly afterwards he lost consciousness. He stated that before losing consciousness he remembered that he had reached a distance of about three hundred or four hundred feet from where he saw the engine standing; that he had, when he reached the point where the highway crossed the track, which was about one hundred and fifty feet north of the engine, glanced back to see if the engine was moving, and found that it was standing

still. He thought at the time he lost consciousness he was walking nearer track No. 3 than track No. 2, but was in the pathway between the two tracks. He stated that he heard no bell, and did not notice the noise of an approaching train but did distinctly remember hearing the noise from the gas-engines at the reduction works. The wind was coming from that direction. He also stated that his thoughts at the time of the accident were upon his work. It was shown that the appellee was injured by being knocked down by the car in the rear of the engine which was standing on the frog at the junction of the two tracks when he passed it on his way to the reduction works, while the engine was making what is known as a "flying switch" on the spur. It was also shown that there is a rule of the railroad company which prohibited the use of the flying switch when it was possible to avoid it, and then only with caution. It was shown, however, that the trainmen did not strictly observe this rule. It was also shown that the operation of making a flying switch was one which necessitated the rapid movement of the engine. Upon cross-examination appellee testified that he was an old railroadman, and familiar with the process of making up trains in the railroad yards and the method of making the flying switch. A number of witnesses testified to the extensive and continued use of the footpath by the public between tracks 2 and 3, as well as other parts of the right of way between the town of Clifton and the reduction works. Except the evidence as to the nature and extent of the injuries received by appellee, the foregoing constitutes substantially the facts put in evidence.

It is urged that the court should have granted the motion of appellant, made at the conclusion of the testimony put in by appellee, and should have instructed the jury to return a verdict for it, because the evidence failed to establish negligence on the part of the railroad company or its employees which made it liable, and because the testimony affirmatively showed that the appellee contributed to his injury through his own negligence and want of care. Counsel for both sides have discussed the question in their briefs as to whether appellee, in going upon appellant's right of way, was a licensee or a naked trespasser. So far as the motion is concerned, we do not think the question whether appellee was

one or the other is controlling. The railroad company owed a duty in either case; not so great, perhaps, in case the appellee was a naked trespasser, as it owed in case he was a licensee by implied consent. In the case of *Egan v. Railroad Co.*, 24 Mont. 569, 63 Pac. 831, relied upon by appellant, the duty which a railroad company owes to a trespasser upon its right of way is stated in the following language: "The defendants owed to the plaintiff, as they did to any other trespasser, the duty to refrain from any willful or wanton act occasioning injury, and the duty to exercise reasonable care to avoid injuring him after becoming aware of his presence on the right of way; but further than this the defendants were under no obligation to the plaintiff." The rule stated in this case, while applicable to ordinary cases of trespassers upon the right of way, does not commend itself as a correct statement of the universal rule applicable to such. Even in the case of trespassers, where a railroad company has knowledge that its right of way is being trespassed upon to such an extent as to make it likely that, without reasonable care on its part in the movement of its trains, the lives of such trespassers may be taken, we think in such a case the railroad company should be held to the exercise of reasonable care, whether they have actual notice of the presence of such trespassers on the track or right of way or not. Human life is of more consequence than the mere convenience of a railroad company in the management and operation of its trains. Where, therefore, a railroad company has good reason to suspect that persons, whether licensees or trespassers, may be in danger from the running of its trains, or the use of its cars or engines in its yards, we hold that some degree of care must be taken to avoid such injuries. The degree of care must depend upon the extent of the danger known to the company. In other words, it does not seem to us to be a question of actual knowledge in any particular case. The liability of the railroad company does not depend, even in the case of a trespasser, upon its actual knowledge that such trespasser is in danger, but whether it has actual knowledge that without care life may be endangered. There can be no doubt, from the testimony in this case, that the railroad company did have actual knowledge of the use of its right of way at the place where appellee was injured, during all hours

of the day and night, by the employees of the reduction works and others; and we think the court properly left to the jury to decide whether the making of the flying switch in the manner as disclosed by the testimony was an act of negligence for which the company was liable.

Upon the question as to whether the court should have withdrawn the case from the jury upon the ground that the facts showed contributory negligence on the part of appellee, we are not able to say, as a matter of law, that, under the circumstances as testified to by him, he failed to exercise that ordinary care which an ordinarily prudent man would have exercised under like circumstances. As was said in *Railroad Co. v. Stout*, 17 Wall. 663, 21 L. Ed. 749: "It is true in many cases that, where the facts are undisputed, the effect of them is for the judgment of the court, and not for the decision of the jury. This is true in that class of cases where the existence of such facts come in question, rather than where deductions or inferences are to be made from the facts. . . . In some cases, too, the necessary inference from the proof is so certain that it may be ruled as a question of law. . . . But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to these intermediate cases that the opposite rule prevails. Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed. Another man, equally sensible and equally impartial, would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. . . . It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge." Again, in *Railroad Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 435, it is said: "As the question of negligence on the part of the defendant was one of fact for the jury to determine under all the circumstances of the case and under proper instructions from the court, so, also, the question of whether there was

negligence in the deceased, which was the approximate cause of the injury, was likewise a question of fact for the jury to determine under like rules. The determination of what is such contributory negligence on the part of the deceased as would defeat this action, or, perhaps, more accurately speaking, the question as to whether deceased at the time of the fatal accident was, under all the circumstances of the case, in the exercise of such due care and diligence as would be expected of a reasonably prudent and careful person under similar circumstances, was no more a question of law for the court than was the question of negligence on the part of the defendant. There is no more of an absolute standard of ordinary care and diligence in the one instance than in the other." This court, in the case of *Hobson v. Railroad Co.*, 2 Ariz. 171, 11 Pac. 545, held, in a case where the undisputed facts tending to establish contributory negligence on the part of the plaintiff were much stronger than in this case, that the question was one for the jury, and not for the court. From a consideration of the facts in reference to the conduct of the appellee at the time of the accident as disclosed by his testimony, we are not able to say as a matter of law that he was guilty of such contributory negligence as to have warranted the court in taking the case from the jury.

Counsel for appellee, in their brief, have argued that the judgment appealed from was without jurisdiction for the reason that the former judgment rendered in this case is in full force and effect, because the order of the trial court granting the motion for a new trial fixed terms which were not complied with by appellant. They have argued that question without assigning cross-error. Whether, under our statutes, an appellee may have an adverse ruling of the trial court reviewed without taking a cross-appeal (which we do not decide), it is certain that under the statute this court can only review such ruling when properly assigned as error, unless the error complained of should appear upon the face of the record. The question whether the terms of the court's order were complied with and the order became effective is certainly not one presented upon the face of the record. The want of a proper assignment of cross-error disposes of this question; but, even were the question before us on such an assignment of cross-error, the reasons given in the brief of

appellee do not establish that the judgment before us is without jurisdiction.

The judgment is affirmed.

Street, C. J., and Davis, J., concur.

[Civil No. 768. Filed March 19, 1902.]

[68 Pac. 553.]

A. G. OLIVER et al., Defendants and Appellants, v. JOHN W. DOUGHERTY, Plaintiff and Appellee.

1. ACTION TO QUIET TITLE—PLEADING—PROOF—VARIANCE—REV. STATS. ARIZ. 1887, PAR. 3132, CONSTRUED.—In an action under paragraph 3132, *supra*, providing that "An action to determine and quiet the title of real property may be brought by any one having or claiming an interest therein, whether in or out of possession of the same, against another who claims an estate or interest adverse to him," where plaintiff alleged that he was the owner in fee of certain property, proof of an equitable title in plaintiff does not constitute such a variance as to preclude a recovery.
2. SAME—EXECUTION SALE—PURCHASER—ACQUIRES EQUITABLE TITLE—MAY MAINTAIN ACTION TO QUIET TITLE—REV. STATS. ARIZ. 1887, PAR. 3132, CONSTRUED.—Where defendant purchased certain property at a foreclosure sale, receiving a sheriff's certificate, but no deed, and went into possession, and subsequently his interest was sold on execution, the purchaser acquires all the equitable title of defendant, and plaintiff as assignee can maintain an action against defendant to quiet title, under paragraph 3132, *supra*.
3. INTERNAL REVENUE—STAMP-TAX—SHERIFF'S CERTIFICATE—ASSIGNMENT—STAMP NOT REQUIRED—ACT CONGRESS, JUNE 13, 1898, CONSTRUED.—As the act of Congress, *supra*, does not require a sheriff's certificate of sale to be stamped, the assignment of such instrument is also free from the duty, as it is only where the original instrument is subject to the duty that assignments are required to be stamped.
4. EXECUTION—LEVY—SHERIFF'S SALE—SALE OF REALTY—VALIDITY—INNOCENT PURCHASER—LAWS OF ARIZ. 1889, ACT. NO. 20, CONSTRUED.—Act No. 20, *supra*, provides that an execution "must require the officer serving the same, if the judgment be against the property of the judgment debtor, to satisfy the judgment . . . out of the personal property of such debtor, and if sufficient personal

property cannot be found, then out of the debtor's real property." Held, that as against an innocent purchaser of realty claiming under an execution sale, a judgment debtor who failed to call the sheriff's attention to personalty, and to require him to satisfy the execution out of it, cannot question the validity of the sheriff's sale, because not complying with the act *supra*.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. R. E. Sloan, Judge. Affirmed.

The facts are stated in the opinion.

Robert E. Morrison, and G. A. Allen, for Appellants.

E. M. Sanford, for Appellee.

STREET, C. J.—John W. Dougherty brought his action in the district court of Yavapai County against the appellants to quiet title to certain property, and alleged in his complaint that he was the owner in fee of the property (describing it), and was entitled to the possession thereof, and that the defendants wrongfully withheld the possession thereof from him; "that defendants, and each of them, claim an estate or interest in and to the above-described pieces and parcels of land and premises adverse to this plaintiff; that the said claim of the said defendants and each of them, is without any right whatsoever; that the said defendants have not, nor have any or either of them, any estate, right, title or interest whatever in said lands or premises, or any part thereof." And plaintiff prayed that the defendants be required to set up their title or interest, and that plaintiff's interest be quieted as against the same. Appellants, as defendants in the district court, answered, denying the allegations of the complaint, and, in a separate answer, set up title in themselves. They say that Charlotte A. Oliver is the wife of A. G. Oliver; that A. G. Oliver recovered a judgment for the sum of \$8,537.40 against Samuel C. Miller and Mary F. Miller, with a decree foreclosing a mortgage on said property; that such proceedings were had under the judgment and decree that the said property was sold at sheriff's sale, and A. G. Oliver bid it in, and received therefor a sheriff's certificate of sale, which was recorded in the office of the county recorder; that after-

wards Mills College and Seminary recovered a judgment against A. G. Oliver for \$873.15, and levied upon said property, and sold the same at sheriff's sale to satisfy said judgment; that one H. D. Ross became the purchaser thereof, and received therefor a sheriff's certificate of sale, and caused the same to be filed in the office of the county recorder; that afterwards Ross assigned all his right, title, and interest in and to said certificate of sale to the said Dougherty, and on October 5, 1899, Dougherty received from the sheriff a sheriff's deed conveying to him all the right, title, and interest acquired by said sale in and to said property; that Oliver never received from the sheriff a deed to the property.

The principal contention of appellants is that the plaintiff did not show title to the property, inasmuch as no deed was issued by the sheriff to A. G. Oliver, but that Oliver only held a certificate of sale. The same question was raised by plea in abatement, which was overruled by the court, and which order is assigned as error, for the reason that the plaintiff, not having a legal title to said property, had no authority in law for maintaining his action herein.

The statute of Arizona provides: "An action to determine and quiet the title of real property may be brought by any one having or claiming an interest therein, whether in or out of possession of the same, against another who claims an estate or interest adverse to him." Rev. Stats. 1887, par. 3132. That statute has received a construction by the United States supreme court in the case of *Ely v. Railroad Co.*, 129 U. S. 291, 9 Sup. Ct. 293, 32 L. Ed. 688, and the complaint is drawn in conformity with such decision. In speaking of the statute, the supreme court says: "The manifest intent of the statute, as thus amended, is that any person owning real property, whether in possession or not, in which another person claims an adverse title or interest, may bring an action against him to determine the adverse claim, and to quiet the plaintiff's title." It is admitted that Oliver went into possession under his certificate of sale, and was in possession at the time of the commencement of this action; so the only question is whether evidence that plaintiff held only an equitable title, under the allegation that he was the owner in fee, is sufficient. There is no such variance between the pleadings and the evidence as would make it impossible for the plaintiff to recover

if the plaintiff could recover at all under an equitable title; but his power to recover under an equitable title seems to be settled by the statute itself, where it says that any one having or claiming an interest therein may bring the action, whether in or out of possession of the same. In this case Oliver was in possession, and was enjoying an equitable title, all of which was the subject of sale and levy; and, when Ross bought under a levy and sale of that equitable interest, he acquired such an interest in the property and such a claim to the property as would support an action to quiet title. Whatever right, claim, or interest one has in property in Arizona is subject to levy and sale; and he who purchases has a right to be put into the same possession of the right, claim, or title which the judgment debtor had therein. Oliver had a leviable interest in the property, and, when his creditor sold under execution his leviable interest, the purchaser acquired the same; and after he had done so he stood in the situation of one having or claiming an interest in real property. All the right, title, and interest of Oliver therein were gone; and whether, under the old common law, the purchaser acquired such an interest as would enable him to maintain ejectment is not before us for decision, but only whether his interest was of such a nature as would support the statutory action for quieting title.

The appellants objected to the introduction of the certificate of sale issued by the sheriff to Ross, and particularly the assignment which was attached to the certificate of sale, by which Ross assigned all his right, title, and interest therein to the plaintiff, Dougherty, for the reason that no revenue stamp was attached, as provided by act of Congress of June 13, 1898. Such certificates of sale do not come within the statute; and the original certificate from the sheriff to the purchaser being an instrument which is not within the statute, and upon which no revenue stamp need be affixed, it must follow that an assignment of the instrument to another is also free from the duty. It is only where the original instrument is subject to the duty that assignments of the instrument are also subject to the duty. Thus, where a mortgage is required by the statute to be stamped, an assignment of the mortgage must also be stamped.

It is objected further by the appellants that plaintiff ought

not to recover in this action for the reason that the sale was void, because, as they allege, the sheriff did not conform to a statutory requirement. It is provided by act No. 20 of the Session Laws of 1889, that an execution "must require the officer serving the same, if the judgment be against the property of the judgment debtor, to satisfy the judgment, with interest, out of the personal property of such debtor, and if sufficient personal property cannot be found then out of the debtor's real property." It is alleged that the sheriff did not conform to that requirement of the statute. Such a provision incorporated in an execution according to the requirements of a statute is but a direction to the sheriff, and it is such a direction as the judgment debtor may require him to comply with before sale. It nowhere appears in the evidence that Oliver made any such demand. The appellants offered evidence to show that, at the time the execution was levied and the sale was made, Oliver had personal property, which offer was denied by the court, and we think properly. There was no offer to show that Oliver had made a demand upon the sheriff that the sheriff refused, and that the purchaser at the sale knew of all those conditions, but it was for the first time to show that the judgment debtor had property. Whether he had ample personal property to satisfy the judgment, or not, cannot affect the title of an innocent purchaser. If the sheriff was executing the writ not in conformity with its terms, and was either ignorant of the fact that the judgment debtor held personal property, or, being aware of it, was purposely avoiding his duty, it was the right and it became the duty of the judgment debtor to call the attention of the sheriff to the fact that he had personal property, and that he was willing to turn it over for that purpose, and, if he refused to do so, to compel him by proper processes to first make the money out of the personal property which the judgment debtor was turning over to him. If the judgment debtor neglected to so protect himself, and permitted the sheriff to proceed to sell real estate, the sale is valid, especially where there is an innocent purchaser. With the evidence as it stood on the record, the court was justified in refusing to admit evidence of the existence of personal property.

These constitute the substantial assignments of error urged by the appellants, and, we seeing no error in the judgment or

in the rulings of the court, the judgment of the district court is affirmed.

Davis, J., and Doan, J., concur.

[Civil No. 771. Filed March 19, 1902.]

[68 Pac. 538.]

G. M. WILLARD et al., Defendants and Appellants, v.
ALFRED CARRIGAN, Plaintiff and Appellee.

1. PLEADING AND PRACTICE—COMPLAINT—CAUSE OF ACTION—CONTRACT—QUANTUM MERUIT—COUNTS—ELECTION—COMMISSIONS—BROKER—REV. STATS. ARIZ. 1901, PARS. 1280, 1289, 1291, CONSTRUED.—Paragraph 1280, *supra*, provides that "The complaint may contain several different causes of action." Paragraph 1289, *supra*, provides that "The complaint shall set forth . . . a concise statement of the causes of action . . . and shall also state the nature of the relief he demands." Paragraph 1291, *supra*, provides that "Only such causes of action may be joined as are capable of the same character of relief." While in a general way, under the statutes, *supra*, a plaintiff who has but one cause of action will not be permitted to plead it as though he possessed two or more distinct demands, yet in a suit to recover broker's commission it is proper to deny a motion to compel plaintiff to elect between his counts before going to trial, the first being on an express contract, the second on a *quantum meruit*, this being a case in which the plaintiff is entitled to frame his pleading to meet the possible proofs which will for the first time fully appear on the trial.
2. SAME—TWO COUNTS ON SAME CAUSE OF ACTION—FINDING—EFFECT.—Where plaintiff brought suit to recover a broker's commission, and his complaint contained two counts,—one on an express contract, and the other on a *quantum meruit*,—a finding of the court in favor of the plaintiff on the first count was tantamount to a finding against him on the second.
3. PRACTICE—PRAYER FOR JOINT AND SEVERAL JUDGMENT—ENTERING SEPARATE JUDGMENTS FOR PROPORTIONATE AMOUNT—NOT ERROR PREJUDICIAL TO DEFENDANT.—Where plaintiff brought suit to recover broker's commission against five defendants jointly, and prayed for a joint and several judgment for ten thousand dollars, the court committed no error prejudicial to defendants in entering a separate judgment against each defendant for two thousand dollars.

4. APPEAL AND ERROR—FINDING—SUFFICIENCY OF EVIDENCE—REVIEW—
BARTER v. PIMA COUNTY, 2 ARIZ. 88, 11 PAC. 62; JORDAN v. DUKE,
4 ARIZ. 278, 53 PAC. 197; WEBBER v. KASTNER, 5 ARIZ. 324, 53 PAC.
207; JORDAN v. SCHUEBMAN, 6 ARIZ. 79, 53 PAC. 579, FOLLOWED.—
A finding by the court below will not be disturbed if there is any
evidence fairly tending to support it.

APPEAL from a judgment of the District Court of the
Fourth Judicial District in and for the County of Yavapai.
R. E. Sloan, Judge. Affirmed.

The facts are stated in the opinion.

Herndon & Norris, for Appellants.

Robert E. Morrison, Thomas C. Job, and W. C. Campbell,
for Appellee.

STREET, C. J.—Alfred Carrigan brought his action
against the appellants and R. L. Van Deren and Etta Wil-
lard, defendants, to recover the sum of ten thousand dollars
as commission for the sale of mining properties. Findings
of fact and judgment were for the plaintiff. The defendants
G. M. Willard, W. W. Nichols, and M. A. Carrier appeal
from such judgment.

Plaintiff's complaint contained two counts. The first count
alleged "that the defendants made and entered into an oral
contract with plaintiff, whereby he undertook to act as a
broker in procuring a purchaser for all said claims; and in
consideration of his services in that behalf to be performed
the defendants herein promised and agreed to and with him,"
etc. The second count alleged "that plaintiff, at the special
instance and request of defendants, performed certain ser-
vices as a broker for them in and about procuring a purchaser
for certain mining property; . . . that said services were rea-
sonably worth the sum of \$10,000," etc. Before trial, de-
fendants moved the court to require plaintiff to elect upon
which of the two causes of action set up in his complaint he
would rely on for a judgment, because it appears that said
two counts are a double statement in different form of the
same cause of action; one being upon an express contract for
a fixed amount, the other upon *quantum meruit* for services
rendered. The statute of Arizona (par. 1280), like the stat-

utes of other states covering code pleadings, provides, "The complaint may contain several different causes of action." It also provides (par. 1289): "The complaint shall set forth clearly the names of the parties, a concise statement of the causes of action, without any distinction between suits at law and in equity, and shall also state the nature of the relief which he demands." It also provides (par. 1291): "Only such causes of action may be joined as are capable of the same character of relief." The term "different causes of action" implies as many distinct causes of action as are held or claimed to be held by the plaintiff. At common law it was permissible to state the same cause of action in as many different ways as the pleader chose, and each method was called a count. In a general way, under our statute and under the code system, the plaintiff who has but one cause of action will not be permitted to plead it as though he possessed two or more distinct demands. This rule, however, is not inflexible; it must yield to the demands of justice and equity. "Under peculiar circumstances, when the exact legal nature of the plaintiff's right and the defendant's liability depend upon facts in the sole possession of the defendant, or upon facts which will not be developed until the trial, the plaintiff may set forth the same single cause of action in varied counts, and with differing averments, so as to meet the possible proofs which will for the first time fully appear on the trial." *Pomeroy on Remedies*, par. 576. In the case of *Wilson v. Smith*, 61 Cal. 209, the complaint there contained two counts; one alleging a promise to pay, and the other alleging a *quantum meruit*. Before the introduction of evidence the defendants moved the court to require the plaintiff to elect upon which count he would proceed. The court denied the motion. The supreme court said: "We cannot say the ruling was erroneous. Under our code, which provides that the complaint must contain a statement of facts constituting the cause of action in ordinary and concise language, the plaintiff may set them out in two separate forms when there is a fair and reasonable doubt of his ability to safely plead them in one mode only." In the case of *Lecke v. Hancock*, 76 Cal. 127, 17 Pac. 937, the complaint was on the first count for money paid, laid out, and expended, on the second count for money lent, and on the third count for money had and received; each count

being separately stated. The prayer was for the sum alleged in each count. The court found "that the plaintiff laid out and expended for the use and benefit," etc., and failed to find upon the issues made by the averments of the other counts and the denials thereof. The finding and judgment of the first count was held to be a finding and judgment against the plaintiff upon the other counts. The court said: "Clearly, in ordinary cases, there must be a distinct finding upon each material issue. But in a case like the present the prayer may be referred to as illustrating the scope of the action, and here the prayer clearly indicates that the counts are in the alternative, the same cause of action being stated in different forms." The court further stated that the right to rely upon a common count has been settled by the earlier decisions in that state. In the case of *Remy v. Olds* (Cal.) 34 Pac. 216, the complaint contained two counts; one for damages on a contract, and the other to recover materials furnished, etc. The defendants requested the court to require plaintiff to elect upon which count or cause of action he would rely, and that thereupon the other cause of action be dismissed. This the court refused to do, and the ruling is assigned as error. In that case the court said: "Conceding that this is an action in which the same cause of action is differently stated in two separate counts, still I think the ruling correct. The right to so plead is well established here. [Citing cases from the supreme court of California.] Since it is allowable to state the cause of action in the alternate, using different counts in order to meet any possible phase of the evidence, a party cannot be deprived of the privilege by being compelled to strike out all causes of action save one before the trial commences. It would render the privilege a barren one." In the fifth volume of the *Encyclopedia of Pleading and Practice* (p. 324) it is said: "In analogy to the common-law practice of inserting money counts in every declaration in *assumpsit*, a complaint may in one count charge a liability on a special or expressed contract, and in another count may seek a recovery on an implied contract"; and cites the states of Georgia, New York, Iowa, and Minnesota. Also, in a note, it says: "The question of granting or refusing a motion, made on the trial, to compel the plaintiff to elect between an allegation of an agreed price and an allegation of the reasonable value of

services, is within the sound discretion of the trial court"; and cites several cases from Minnesota, one from Colorado, and some from New York. Thus we will see that while, in a general way, it is not permissible for a pleader to state his one single cause of action in more than one way, yet there are conditions and circumstances which make it permissible for him to state it in as many ways as the proof may make necessary. It is often difficult to tell in advance whether the evidence will reveal an express contract or an implied contract. Services may be rendered, and the fact of their having been rendered and received is undeniable. The question of price is but the one thing to be determined. That question may depend upon a contract, or, in the absence of a contract, depend upon value. The plaintiff may conceive that he has a contract, and so allege it. The defendant may conceive that there was no contract, and that the value was less than that which was alleged by the plaintiff to be the contract price. In such case it would not be right nor equitable for the plaintiff to lose his claim because he failed to prove his contract, although he had rendered his services. Therefore he must be allowed to plead it in different ways, and not run the hazard of losing his claim by being compelled to elect upon which class of evidence he must rely. It is plain that he has but one cause of action. In a review of the evidence in this case the condition of the evidence reveals just such a condition, and the trial court committed no error when it refused to require the plaintiff to elect upon which class of evidence he would go to trial. The court found that the defendants made and entered into an oral contract; and, not finding upon the second count as to the value of the services, following the decisions of other courts, it is a finding of fact against the plaintiff upon the second count, or, as counsel term it, the "second cause of action."

The court rendered judgment that the plaintiff, Alfred Carrigan, do have and recover of and from said defendants the sum of ten thousand dollars, and his costs of suit, etc., and that he recover from each of said defendants such a part of said sum of ten thousand dollars as they are each severally liable for, as follows, to wit: G. M. Willard, two thousand dollars; R. L. Van Deren, two thousand dollars; Etta Willard, two thousand dollars; W. W. Nichols, two thousand dol-

lars; M. A. Carrier, two thousand dollars. The appellants say that, if each of these five defendants is indebted to the plaintiff in the sum of two thousand dollars, that plaintiff has missed his remedy. He should have brought five separate suits against five separate defendants. Such a conclusion does not follow. If there be error in the judgment, it is against the plaintiff, instead of the defendants; for plaintiff asked for a judgment against all of the defendants jointly and separately in the sum of ten thousand dollars, whereas there has been but a separate judgment entered against these appellants in the sum for one fifth of the amount against each. Contracts may be drawn so that in pursuing the remedies under them through the courts but one cause of action exists against many, and yet the evidence may disclose the fact that in rendering a judgment against all the amount for which each is liable is but a moiety of the whole.

The principal contention of the appellants is that the findings of the court are against the evidence, and are not supported by it, and that the judgment is against the evidence, and not supported by it, and that the findings and judgment are not supported by the pleadings. This court has frequently laid down the rule upon the question of review of the facts. One of its expressions is: "If there is evidence to support it [the verdict], unless there be error in the court in directing the issues, or in the introduction or rejection of evidence, or in the instructions to the jury, it must stand." *Jordan v. Duke*, 4 Ariz. 278, 53 Pac. 197. Another is: "Unless findings of a court are manifestly against the weight of evidence, the supreme court will not disturb them." *Webber v. Kastner*, 5 Ariz. 324, 53 Pac. 207. Another is: "Where a verdict and judgment are supported by the evidence, they will not be disturbed on appeal, unless substantial error appears on the record." *Jordan v. Schuerman*, 6 Ariz. 79, 53 Pac. 579. Again: "The findings of the trial court upon controverted questions of fact cannot be deemed erroneous, except for very forcible reasons." *Henry v. Mayer*, 6 Ariz. 103, 53 Pac. 590. Again: "Where the evidence is conflicting, the decision of the lower court will be affirmed." *Barter v. Pima*, 2 Ariz. 88, 11 Pac. 62. We understand the rule to be that a finding by the court below will not be disturbed if there is any evidence fairly tending to support it. In reviewing the evidence to

determine whether the findings and the judgment are against the evidence, and not supported by it, we have read the evidence as it appears upon the transcript on appeal, and we find that the evidence goes beyond the necessity of invoking the rule of doubt. We believe that the findings and the judgment are very fairly supported by the evidence, and that the conclusions of the court therefrom are correct. We believe that under the evidence the plaintiff was fairly entitled to a judgment against the defendants. We believe that a purchaser for the mines was obtained through the instrumentality of the plaintiff, under a contract which he had with the defendants. It is upon this point that appellants have so strenuously argued, and upon which the whole case on appeal mainly rests; yet we have reviewed other assignments of error, and see no reason for reversing the judgment of the court.

The judgment of the district court is affirmed.

Davis, J., and Doan, J., concur.

[Civil No. 761. Filed March 19, 1902.]

[68 Pac. 547.]

FRANK H. HEREFORD, Administrator of the Estate of Joseph D. Andrews, Deceased, Defendant and Plaintiff in Error, v. GEORGE PUSCH, Plaintiff and Defendant in Error.

1. TROVER AND CONVERSION—PLEADING—EVIDENCE—VARIANCE—PUBLIC LANDS—FENCES ON—FIXTURES.—In an action for the conversion of firewood, a complaint alleging its ownership by plaintiff, its conversion and sale by defendant, and his refusal on demand to pay therefor is not supported by evidence that plaintiff built a wood and brush fence upon public lands to none of which he had title; that, by mistake of fact, he built part of the fence upon ground other than he had intended; that shortly thereafter defendant took up the adjoining tract of land on which said fence stood and claimed that part of the fence which stood thereon; that thereafter plaintiff discovered his mistake, and built a wire fence ninety feet south of the fence in controversy, and that thereupon defendant detached said fence and sold the wood composing the same;

that plaintiff demanded the wood, which defendant refused to surrender but claims as his own.

2. SAME — DEMAND — PLEADING — PROOF — VARIANCE. — Where the complaint alleges the conversion and sale of property and a demand for payment for the same, evidence that plaintiff demanded the property which defendant refused and claimed the material as his own, is incompetent and immaterial and fails to support the pleading.

3. FIXTURES — TROVER AND CONVERSION — PUBLIC LANDS — FENCE ON. — A fence placed on government land by mistake passes with the land to a subsequent purchaser from the government, and the original owner thereof cannot maintain an action against the purchaser for conversion in removing and selling the fence, as the doctrine of trade fixtures and right of removal thereof does not apply.

ERROR to the District Court of the Second Judicial District in and for the County of Graham. George R. Davis, Judge. Reversed.

The facts are stated in the opinion.

Hereford & Hazzard, for Plaintiff in Error.

The fence from the time of its construction was a part of the realty, and as such passed to the defendant Andrews, under the patent from the United States. *Seymour v. Watson*, 5 Blackf. 555, 36 Am. Dec. 556; *Binkley v. Forkner*, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33; *Hacker v. Monroe*, 176 Ill. 384, 52 N. E. 12; *Wentz v. Fincher*, 12 Ired. 297, 55 Am. Dec. 416; *Kimball v. Adams*, 52 Wis. 554, 9 N. W. 170; *Mitchell v. Billingsley*, 17 Ala. 391; *Graham v. Roark*, 23 Ark. 19; *Merritt v. Judd*, 14 Cal. 59; *Blair v. Worley*, 1 Scam. (2 Ill.) 178; *Burlerson v. Teeple*, 2 Greene, (Iowa) 542; *Climer v. Wallace*, 28 Mo. 556, 75 Am. Dec. 135; *Treadway v. Sharon*, 7 Nev. 37.

"The fact that the person attaching the articles or structures acts in good faith under a mistake as to the title to the land or his rights therein gives him no rights in the article annexed." *Hamilton v. Huntley*, 78 Ind. 523, 41 Am. Rep. 593; *Stillman v. Hamer*, 7 How. (Miss.) 421; *Huebschmann v. McHenry*, 29 Wis. 655; *Honzik v. Delaglise*, 65 Wis. 501, 56 Am. Rep. 634, 27 N. W. 171.

"One who purchases land from the United States becomes

the owner of personal property affixed to the land by a third person while the land was a part of the public domain." *McKiernan v. Hesse*, 51 Cal. 594.

A fence built upon the public domain, with posts set in the ground, becomes a part of the realty, and passes to a purchaser from the United States. *Pennybecker v. McDougal*, 48 Cal. 160.

And an act of the legislature authorizing the removal of such improvements as against the grantee of the United States is void. *Collins v. Bartlett*, 44 Cal. 371.

John B. Wright, for Defendant in Error.

DOAN, J.—In the year 1888 or 1889, George Pusch, the plaintiff in the lower court and the appellee herein, cut posts four or five inches in diameter from palo verde trees on government lands in Pima County and removed them to what he supposed was the northeast quarter of section 36, township 13 south, range 13 east, a school section in that county, and built out of the said posts and of brush gathered by him and his employees a fence which he constructed by setting the said posts one or two feet in the ground in such a way that the brush could be piled between them, thereby making a continuous fence inclosing a tract of land one half of a mile in length and one quarter of a mile in width, which he used as a pasture for his cattle in connection with his butcher business; he having built a slaughter-house on the tract of land thus inclosed, which he was then, and has been until the present time, conducting in connection with a butcher-shop in the city of Tucson. He had no title to any of the land upon which the fence and buildings were built at the time of placing them there, nor, until some time in the year 1897, when he leased from the supervisors of the county that part of the land in question embraced within the north half of the northeast quarter of section 36, and has since that time occupied that land under such lease. On the fourteenth day of November, 1889, Joseph D. Andrews made a homestead entry upon the southeast quarter of section 25, township 13 south, range 13 east, the land adjoining and lying immediately north of the northeast quarter of section 36, and on the nineteenth day of June, 1895, received from the government a deed to the said lands, which he duly recorded in the public records of

Pima County. Two several surveys made by the government surveyors, George J. Roskrige in 1889, and Philip Contzen in 1895, for the purpose of determining the boundary-line of Andrews' property, located the section line between the said sections 36 and 25 about ninety feet south of the north line of the fence that had been erected by the plaintiff Pusch, inclosing the tract of land first above referred to, and established the fact that the north line of the fence erected by Pusch and about ninety feet of the north end of the eastern and western lines were upon the southeast quarter of section 25, belonging to Andrews, instead of being upon the northeast quarter of section 36, as was intended by Pusch when the fence was built. Some time in the month of November, 1897, the plaintiff constructed a new fence, composed of posts and barb wire, on the line between sections 36 and 25, being about ninety feet south of the north line of the old fence. When the new fence was built and Andrews began to remove the old fence, the plaintiff claimed the wood of which the old fence was built, and demanded it of Andrews, who refused to give it to him, claiming it as his own property. Andrews afterwards tore down and removed the old fence, and sold the wood of which it had been constructed. The value of the wood on the ground where the fence was built was \$297. There had been several surveys of the line between the said sections 36 and 25. The plaintiff, when he built the fence, supposed he was building it upon the section-line. He was not familiar with the subsequent surveys, and was not satisfied, until he began the construction of the new fence, that the old fence was not upon the line dividing the two sections. On January 27, 1898, the plaintiff brought suit against the defendant Andrews in a justice's court, upon the following complaint (after the heading): "(1) Plaintiff alleges that said parties reside in said county; (2) That heretofore, and on the 1st day of November, 1897, plaintiff was the owner of ninety-nine cords of firewood, the same being of the value of \$297; that the said wood was in the possession of said defendant in said county; that said defendant, on or about the 14th day of January, 1898, sold said wood to divers persons, and delivered same to the purchasers thereof; (3) That afterwards, and on the said day, plaintiff demanded of and from the said defendant the pay for said wood, but the defendant

refused to pay therefor, or for any thereof; wherefore plaintiff demands judgment for the sum of \$297, and for costs of suit." The defendant entered a general denial. In aid of this suit, an attachment was issued upon an affidavit executed and filed by the plaintiff, stating that the defendant was "indebted to the plaintiff in the amount sued for upon an implied contract for the direct payment of money for ninety-nine cords of wood, the property of the plaintiff, and being in the possession of the defendant temporarily was sold by the defendant, and the value thereof retained by him." Recovery was had against the defendant, who appealed to the district court. Before the trial in the district court, Joseph D. Andrews died, and Frank H. Hereford, administrator of the estate, was substituted as defendant. The administrator filed an amended answer, setting up the statute of limitations, in addition to the general denial. On trial of the cause before the court without a jury, the court found "that the property in controversy was personal property, and was the property of the plaintiff; that while it was the property of the plaintiff, the defendant, without right, took it into his possession and converted it,—that is to say, the said Joseph D. Andrews, before the bringing of this suit, without right, took said property into his possession and converted it; that at the time of its said conversion the value of the said property was the sum of \$297,"—and gave judgment for plaintiff for that amount against the administrator of the estate and the sureties on the appeal bond. From which judgment, and the denial of a motion for a new trial, the defendant appeals.

There is no controversy as to the evidence on any question of fact in the case, the evidence given on either side being perfectly consistent with that given on the other, and either side admitting the truth of all the evidence offered by the other. The determination of the case depends entirely upon the correctness of the deductions of law on the part of the lower court from the undisputed facts in the case. The appellant's brief contains nine different assignments of error, but these are properly divisible into five heads: 1. That the court erred in finding that the property in controversy was the personal property of the plaintiff, whereas, in fact, it was real property, by reason of its having been a permanent fixture attached to the realty, and was therefore conveyed to the

defendant by the deed from the government in 1895, that conveyed the land whereon it stood; 2. That the court erred in finding that the defendant wrongfully took and converted the wood, for the reason that such wrongful taking and conversion were not alleged in the complaint; 3. That the court erred in rendering judgment for the plaintiff, for the reason that the complaint does not state facts sufficient to constitute a cause of action, and was therefore insufficient to authorize a judgment for the plaintiff; 4. That the court erred in rendering judgment for the plaintiff, for the reason that the evidence showed no demand by the plaintiff for the payment for the wood, as alleged in the complaint; and 5. That the court erred in not rendering judgment for the defendant on his plea of the statute of limitations, the wood having been in his possession for more than two years before the alleged conversion.

An examination of the record reveals the utter absence of any evidence to support the allegations of the complaint. There was no allegation in the complaint of any fence, but the suit was brought for ninety-nine cords of wood. When the plaintiff presented his evidence, he established, as a fact beyond controversy, that he built a fence upon public government lands, to none of which he had title; that by mistake of fact he built the part of the fence now in controversy upon another tract than the one he intended; and that shortly thereafter the defendant took up the adjoining tract of land on which said fence stood and claimed the part of the fence that was on his (defendant's) land. Some six years thereafter the defendant obtained title from the government to the land on which stood the fence in controversy. The plaintiff testified that some time in November, 1897, he began building a new fence on the correct line, and that at that time the old fence was standing, as it had been for eight or nine years, on the land of the defendant, about ninety feet distant from the line. There is no evidence to support the allegation in the complaint that he was the owner of ninety-nine cords, or any number of cords, of firewood on November 1, 1897, but on the contrary, his direct evidence that on November 1st he was claiming to be the owner of a fence, then in use as a fence on the defendant's land, which he afterwards, during November, and while it was yet a fence attached to the realty by

the posts set in the ground, separated from the tract of land of which he was in possession by a new fence which he himself built ninety feet south of it. He alleges, in his complaint, that on the fourteenth day of January, after the defendant had sold the material of which the said fence had been composed, he demanded the pay for it, which the defendant refused. He fails to support that allegation by any evidence, but he testifies, without any pleading to authorize or render material or competent such evidence, that in November, 1897, after he had built the new fence, at the time when Andrews began to remove the old fence, he (plaintiff) claimed the wood comprising the said fence, and demanded it of the defendant, which demand the defendant refused, and claimed the material as his own property.

We will first consider the character of the property. The position relied upon by the appellee, that the fence was personal property and the plaintiff should be allowed to remove it because of the liberal construction given to the law of fixtures in the consideration of trade fixtures, is untenable, because of the fact that a pasture fence is not, and has never in any instance been considered, a trade fixture, and because of the further fact that the liberal construction placed by the courts upon the law relative to trade fixtures has been nearly invariably adopted in cases arising between the landlord and tenant, while no such relation can be said to exist in this case. This subject was very exhaustively considered, and very ably presented, by Justice Cowan in the case of *Walker v. Sherman*, 20 Wend. 636, and has been very generally followed from that time to the present. The court there held: "The question is one between tenants in common, the owners of the fee, and is, we think, to be decided on the same principle as if it had arisen between grantor and grantee. . . . As between such parties, the doctrine of fixtures making a part of the freehold, and passing with it, is more extensively applied than between any others. As between the tenant for life or years and reversioner or remainderman, all erections by the former for the purpose of trade or manufactures, though fixed to the freehold, are considered as his personal property, and as such may be removed by him during his term, or be made available to his creditors, . . . whereas they are carried, by a devise or other conveyance of the land, to

the devisee or vendee. . . . The general rule is that anything of a personal nature cannot be considered as an incident to the land, even as between vendor and vendee. . . . This is not universally so. Our ordinary farm fences or rails, and even stone walls, are affixed to the premises in no other sense than by the power of gravitation. It is the same with many other erections of the lighter kind about the farm." The relaxation of the ancient doctrine respecting fixtures that has obtained in favor of tenants and against landlords, and the distinction between the relation of vendor and vendee on one hand and tenant and landlord on the other, is considered at length in this decision, and is distinctly recognized, and the inconsistency that appears to arise in the American decisions is largely attributed to the courts not attending to the distinction maintained by the older cases between the two relations of vendor and vendee and tenant and landlord. The rulings of our courts in recent years, to the effect that the intention of the parties very largely controls the question whether personal property loses its character of personal property and becomes realty by reason of being affixed to the freehold for the purpose of trade or manufacture, will be found, on examination, to apply only as between the parties themselves, where no innocent purchaser has come into consideration in the case. That doctrine is correctly set forth in *Treadway v. Sharon*, 7 Nev. 37, in which case it is held that trade fixtures do become part of the realty, whatever intention to the contrary on the part of the tenants erecting them may be inferred, but the law indulges the tenant with the right of removing them during his term, as between the tenant and landlord, but they pass by a grant of the land as a part of the realty, and when placed on public land by one in possession without title the one who thus places them there has no greater right to the fixtures as against one whom he suffers to acquire title to the land than has the vendor of land as against his vendee. It has been held by the courts, without exception, that not only as between vendor and vendee the fences pass by grant of the land, but that a fence placed on government land by mistake passes with the land to a subsequent purchaser from the government. *Seymour v. Watson*, 36 Am. Dec. 556; *Merritt v. Judd*, 14 Cal. 59; *Johnson's Exr. v. Wiseman's Exr.*, 4 Met. (Ky.) 360, 83 Am.

Dec. 475; *Rowand v. Anderson*, 33 Kan. 264, 6 Pac. 255, 52 Am. Rep. 529; *Railroad Co. v. Morgan*, 42 Kan. 23, 21 Pac. 809, 4 L. R. A. 284, 16 Am. St. Rep. 471. And it has been held in California that a statute allowing those who put improvements on public lands of the United States to remove the same within six months after the land has become the private property of any person, and declaring fences to be improvements within the meaning of said act, in so far as it relates to improvements which as fixtures have become part of the realty, is void. *Collins v. Bartlett*, 44 Cal. 371; *Pennybecker v. McDougal*, 48 Cal. 160; *McKiernan v. Hesse*, 51 Cal. 594.

It is established by undisputed evidence that on November 1, 1897, the only time that the ownership of the property is alleged to have been in the plaintiff, the fence was attached to the realty, and therefore a part thereof. This determines the character of the property and the ownership of it on that date, and renders immaterial the fact that the owner of the land afterwards severed it from the realty and reduced it to personal property.

The posts, that represent the wood sued for, when they were set in the ground in the construction of the fence, lost their identity in the fence, and the fence became a fixture when thus attached to the land in 1889, and passed as a part of the realty to the defendant under the deed from the government in 1895, that conveyed the land to which it was attached, and the court erred in finding it to be the personal property of the plaintiff. It follows that the fence, being a part of the realty, and the property of the defendant, conveyed to him by the deed from the government that conveyed the land whereon it stood, the defendant was entitled to judgment for his costs in the lower court, and the court erred in giving judgment for the plaintiff against the defendant, for the material of which the fence was constructed as personal property. This renders unnecessary the consideration of the other errors assigned in the brief. The judgment of the lower court is reversed, and the cause remanded, with direction to the lower court to render judgment for the defendant for his costs in the case.

Street, C. J., and Sloan, J., concur.

[Civil No. 767. Filed March 19, 1902.]

[68 Pac. 558.]

CHARLES GOLDMAN, Administrator of the Estate of M. Wormser, Deceased, Plaintiff and Appellant, v. PEDRO SOTELO, Defendant and Appellee.

1. **EJECTMENT—DEFENSE—ADVERSE POSSESSION — STATEMENT OF LIMITATION—WHERE PLAINTIFF CLAIMS UNDER DEEDS FROM DEFENDANT—REV. STATS. ARIZ. 1887, PARS. 2297, 2299, CITED.**—Under paragraph 2297, *supra*, providing that adverse possession must be either under title or color of title to set up the three-year bar, and paragraph 2299, *supra*, providing among other things that adverse possession must be under a deed duly registered to set up the five-year bar, a defendant in ejectment is precluded from setting up adverse possession for either period as against his own deed to plaintiff, upon which deed plaintiff declared solely.
2. **SAME—SAME—SAME—SAME—FIVE-YEAR LIMITATION — PAYMENT OF TAXES—REV. STATS. ARIZ. 1887, PAR. 2299, CONSTRUED.**—Under paragraph 2299, *supra*, providing that any one paying taxes on the property and doing certain other things may set up adverse possession for five years as a defense to an action to recover said property, evidence of payment of taxes prior to the particular years set up in the defense is irrelevant and immaterial.
3. **SAME—ISSUES—INSTRUCTIONS TO JURY—MISLEADING.**—Plaintiff in ejectment declared solely upon his conveyances from the defendant, which on their face vested in him title and right of possession. The defendant set up in his answer two defenses,—one that the deed relied on by plaintiff was a mortgage, the other that the action of the plaintiff had been barred by the statute of limitations. The latter defense not being open under the pleadings and evidence, and the only issue being whether deed from defendant to plaintiff was intended as an absolute conveyance or as a mortgage, it was erroneous and misleading to instruct that the verdict must be for the defendant, even if plaintiff is shown to have the legal title, if defendant had the right to the possession of the property at the commencement of the action, as, under the issues, the defendant could not be found to have had the right to possession unless he had the legal title.
4. **STATUTORY CONSTRUCTION — STATUTE COPIED — INTERPRETATION OF STATUTE BY FORMER STATE—PRESUMABLY ADOPTED.**—Having copied *verbatim* the statute of another state, the legislature is presumed to have adopted with it the interpretation of it as given by the supreme court of the state.

APPEAL from a judgment of the District Court of the

Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Reversed.

The facts are stated in the opinion.

Baker & Bennett, for Appellant.

One claiming land by virtue of possession, peaceable and adverse, for three years must show in addition thereto a regular chain of title from the sovereignty of the soil down to himself, unbroken by any conveyance of the property by himself, or rather that the chain of title from the sovereignty of the soil must end and terminate in himself. *Voight v. Mackle*, 71 Tex. 78, 8 S. W. 623; *Wright v. Daly*, 26 Tex. 730; *Harris v. Hardeman*, 27 Tex. 249; *Long v. Brenneman*, 59 Tex. 211; *Brownson v. Scanlon*, 59 Tex. 225; *Blum v. Rogers*, 71 Tex. 677, 9 S. W. 595; *Grigsby v. May*, 84 Tex. 254, 19 S. W. 343.

Millay & Christy, and C. F. Ainsworth, for Appellee.

DOAN, J.—Charles Goldman, administrator of the estate of M. Wormser, deceased, brought an action of ejectment on February 24, 1900, in the district court of Maricopa County, against Pedro Sotelo, to recover possession of one hundred and ten acres of land in Maricopa County, to which he claimed title and the right of possession in M. Wormser, deceased, at the time of death, and in himself, as administrator, on May 10, 1898, on which date he alleged ouster, wrongful possession, and refusal to surrender on the part of the defendant. The defendant set up in his answer peaceable and adverse possession under title or color of title for three years next before the commencement of the action; peaceable and adverse possession of the premises, cultivating, using, and enjoying the same and paying taxes thereon, and claiming under a deed or deeds duly registered for more than five years next before the commencement of the action; and set up the bar of limitation in such cases provided. In addition to the statute of limitations, he set up a plea of not guilty and a general denial, after which, as a special further defense, he alleged that: "The plaintiff does hold a certain deed or deeds purporting to convey the lands and premises described in the complaint from the defendant to said M. Wormser,

deceased, on which the defendant believes the plaintiff founds this action; but that any such deed or deeds so given and executed by this defendant to said M. Wormser, deceased, were intended only to be given, and were so received, as security for a certain debt which said defendant owed to said M. Wormser, deceased, which said debt has long since been fully paid off and satisfied." The trial of the cause was had before a jury on June 11, 1901, upon which trial the plaintiff introduced in evidence a warranty deed executed by Pedro Sotelo to Miguel Wormser, dated July 10, 1888, duly acknowledged and recorded, conveying the premises in question; also a warranty deed executed by Pedro Sotelo and his wife, Francisca, to M. Wormser, dated April 15, 1890, duly acknowledged and recorded. This last-mentioned deed recited that it was executed to correct the description of land conveyed by the deed above mentioned of July 10, 1888. The defendant offered in evidence a patent conveying the land in controversy from the United States to Pedro Sotelo, dated May 23, 1888, and oral testimony. After the introduction of evidence and the argument of counsel, the case was submitted to the jury on the charge of the court including the instructions given upon the request of the plaintiff and the defendant. The jury, by their verdict, found for the defendant, and judgment was entered in accordance with such verdict. A motion for a new trial was denied. From the judgment and the denial of the motion for a new trial, the plaintiff appeals.

The appellant has assigned nine several errors on the part of the lower court, seven of them directed against the instructions of the court. The most serious objection to the instructions of the court is urged against the third instruction given at the request of the defendant, to wit: "The court instructs the jury that, in order for him to recover in this action, it is not sufficient for the plaintiff to show the legal title in himself, but he must also show he had the right of possession of the property in question at the time of the commencement of this action, and has such right of possession now; and, even if the plaintiff be found by you, from the evidence, to have the legal title, if you further find that the defendant had, at the time of the commencement of this action, a just and equitable right to the possession of the said property, then your verdict must be for the defendant." The giving of this in-

struction is assigned as error, for the reason that there is no evidence in the record upon which to base such instruction. The instruction complained of, although unquestionably good law in a great many cases in ejectment,—possibly in the majority,—is not the law applicable to this case, as presented by the pleadings and the evidence. Neither is it consistent with the other instructions given by the court, and it may have misled the jury. Where the title exists in one party, and the legal or equitable right of possession is set out in his pleadings by the other party, and is sustained by evidence, the instruction complained of would have been applicable, and would correctly state the law. In this case, however, the plaintiff declared solely upon his conveyances from the defendant, which, on their face, vested in him title and right of possession. The defendant set up in his answer only two defenses—one that the deed relied on by the plaintiff was a mortgage; the other that the action of the plaintiff had been barred by the statute of limitations. The court instructed the jury, that: “The execution and delivery of the deeds from Sotelo to Wormser in evidence in this case is not disputed, and those deeds upon their face convey the title and right of possession to Wormser.” “The fact that after the execution of the deeds Sotelo remained in the occupancy of the land is not sufficient to change the character of those instruments from conveyances of title to mortgages for the security of the debt.” “The deeds from Sotelo to Wormser in evidence are upon their face sufficient to convey the title and right of possession to the lands in dispute to Wormser, and the presumption of law is that they were executed for that purpose, and that presumption can only be overcome by clear, satisfactory, and convincing testimony that they were never intended for that purpose, either by Sotelo or Wormser.” These instructions tell the jury in plain terms that the deeds in question, if deeds of conveyance as indicated on their face, would convey the title and right of possession to Wormser, and would warrant a verdict on their part for the plaintiff, unless some other defense was shown by the defendant. The only other defense pleaded by the defendant was the statute of limitations. The defendant, Sotelo, could not avail himself of either the three-year or five-year statute of limitation without at the same time showing that he claimed under a deed

or deeds duly registered, and such deed or deeds must be subsequent to the deeds by which he himself had conveyed the property to the plaintiff; in other words, he could not set up the statute of limitations as against his own deed, relying upon his former title. One claiming land by virtue of possession, peaceable and adverse, for three years, under our statute, must show, in addition thereto, a regular chain of title from the sovereignty of the soil down to himself; or, rather, the chain of title from the sovereignty of the soil must end and terminate in himself. One claiming by such possession for five years must show, in addition thereto, use, cultivation, and payment of taxes, and that he is claiming under a deed or deeds duly registered. On that point the court instructed the jury: "In order that the defendant may avail himself of the statute of limitation in this case, he must prove continuous adverse possession of the disputed premises for five years under a recorded deed, and the payment of taxes on the land by the party pleading the limitation for each of the five years; and the omission to pay taxes by the party pleading the statute is fatal to such defense." There is no evidence in the record of the payment of taxes on the land by the party pleading the limitation for any one of the five years next preceding the action. There was some evidence relative to Wormser, the deceased, having charged the defendant, in 1890, for the taxes on the land in dispute for the year 1889, but that would be wholly irrelevant and immaterial if sustained, because the only years for which the payment of taxes was material were the years of 1893, 1894, 1895, 1896, and 1897. The court further instructed the jury: "No. 7. Possession of the premises in controversy by the defendant for three years cannot avail the defendant as evidence of his right of possession of said premises, unless he shows, in addition thereto, a chain of title from the United States to himself, without any subsequent conveyance of the title away from himself. If, after that title has been vested in the defendant by the consecutive chain of title from the United States to him, the defendant has conveyed the land in controversy to plaintiff's intestate, M. Wormser, he cannot base his three-years' possession of said premises under such chain of title to himself as against his own subsequent grantee, M. Wormser, or his administrator." The language of our statute

extends the restriction pronounced in this instruction, holding that the conveyance of title from himself by the defendant after the date of the deed conveying the title to him deprives such defendant of the benefit of the statute of limitation by reason of possession for three years, to the plea of the statute by reason of possession for five years with equal force. These instructions told the jury, in substance, that if the deeds in question executed by the defendant to Wormser were conveyances of title, as indicated on their face, the defendant could not avail himself of either the five or the three-years' statute of limitation against the plaintiff, and thus eliminated the question of limitation from the case, and left before the jury only the one issue: If the deeds in question were conveyances of title, the jury should find for the plaintiff; if they were mortgages for security of debt, they should find for the defendant. Pursuant to this idea, the court very properly followed up the last instruction quoted by the further instruction: "The court instructs the jury that if it finds from the evidence that the defendant is in possession of the lands in controversy, and that the plaintiff claims the right of possession of the same by virtue of a deed or deeds to the same, executed and delivered by the defendant to Wormser, deceased; and if the jury further find from the evidence that the defendant executed and delivered said deed or deeds to M. Wormser, deceased, as security for a debt or debts,—then the plaintiff cannot recover in this action under such deed or deeds." It is urged by counsel for appellee that plaintiff's given instruction No. 7 was too strict, because the grantor may plead the statute of limitations against his grantee; and he supports this position by citing New York and California authorities. The New York statute provides that adverse possession for a period of twenty years gives title. In the case of *Jackson v. Oltz*, 8 Wend. 440, it was held that, to constitute adverse possession, there must in all cases be a claim of title. A deed need not be shown as evidence of that title; but where there is no paper title there must be a *pedis possessio*,—an actual occupancy. If the possession was adverse, and had been so for more than twenty years, then that possession ripened into a title, and the possessor must recover against the holder of the true title, although the paper title is in reality not in such pos-

essor. *Sherman v. Kane*, 86 N. Y. 57, following the same doctrine, declares that the legal presumption is in favor of the person establishing title, unless the premises are shown to be held adverse to the title for at least twenty years before the commencement of the action. The California statute of limitations relating to real estate is copied from the statute of New York with but slight verbal changes, and provides that five years' adverse possession covers all actions, and as effectually bars all rights of other claimants as twenty years' adverse possession under the New York statutes or sixty years' adverse possession under the common law. The California statute reads: "No action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within five years before the commencement of such action." Code Civ. Proc., sec. 318. Under this statute the supreme court of California has held that: "An adverse possession of land for a period of time prescribed by the statute not only bars the remedy, but practically extinguishes the right of the party having the true, proper title, and vests a perfect title in the adverse holder." *Garibaldi v. Shattuck*, 70 Cal. 511, 11 Pac. 778; *Richardson v. Williamson*, 24 Cal. 289; *Arrington v. Liscom*, 34 Cal. 385, 94 Am. Dec. 722. These doctrines are not applicable to the case at bar because of the statutes under which they were rendered being radically different from our statute. The New York and California statutes accorded the benefit of the bar to the adverse holder by reason simply of adverse possession, whereas our statute provides (Rev. Stats. 1887, sec. 2297) that the adverse possession shall be held either "under title or color of title" or (sec. 2299) "under a deed or deeds duly registered." The Arizona statute of limitations relied on by the defendant in this case was taken from the statute of Texas, and the law on this subject, as recognized by the supreme court of that state, is given in the case of *Voight v. Mackle*, 71 Tex. 78, 8 S. W. 623. This is a well-considered case, and is founded upon a long line of decisions of the supreme court of Texas upon the same statute. In this case the grantor of the land brought a suit to quiet title against the party to whom his grantee had conveyed the land, and in his complaint set up

his adverse possession, use, cultivation, and payment of taxes under the duly registered deed made to him ten years prior to his conveyance to his immediate grantee, and the lower court held that he had acquired title by virtue of the five-year statute of limitation, and gave him judgment. The supreme court, in reversing this judgment, say: "In *Harris v. Harde-man*, 27 Tex. 248, it is said, and perhaps authoritatively decided, that, when the ancestor has conveyed the land in his lifetime, his heirs, upon gaining possession, had no title, and could not set up the statute of limitation either of three years or five years, under the grant to him. The statement of the case does not clearly show whether the point as to the limitation of five years was presented or not, though the language of the court in the opinion would indicate that it was. However that may be, the principle announced is sound. The reason upon which the statute of five years is based would seem to be that the party, by taking possession under a deed, which is spread upon the records, gives distinct notice of his claim to the land and of the deed through which he derived his title. If, after this open challenge of the rights of the adverse claimants, his possession, use, cultivation, and payment of taxes continue for five years, the statute means that he shall be conclusively presumed to be the owner of the land. But can a possessor who has subsequently conveyed the land be said to claim that under the conveyance which he had transferred to another? We think not. In order to avail himself of the statute as a claimant under a recorded deed, he need not have the lawful title, but he must at least retain during the statutory period such claim as the deed purports to convey." Aside from the soundness of its reasoning, this decision is of particular weight in this territory for the reason that our statute of limitations, pleaded by the appellee in this case, is copied *verbatim* from the statute of Texas, and the decision quoted above is the interpretation of that statute by the state from which it was adopted; and, having adopted the statute, the legislature is presumed to have adopted with it the interpretation of it as given by the supreme court of the state.

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This condition of the case narrowed down the issue before the jury to the consideration of the character of the instruments in question, and left the case in such condition "that,

in order for him to recover in this action, it" was "sufficient for the plaintiff to show the legal title in himself," because in this case, under the law as it was declared by the court in his instructions, the plaintiff, in order to show the legal title in himself, necessarily by that act showed right of possession; and, the showing of the legal title likewise showing right of possession, left nothing further incumbent on the plaintiff, and rendered erroneous the instruction of the court complained of, to wit: "Even if the plaintiff be found by you from the evidence to have the legal title, if you further find that the defendant had, at the time of the commencement of the action, a just and equitable right to the possession of the said property, then your verdict must be for the defendant." For the reason that, if the plaintiff was found by the jury from the evidence to have the legal title, it was impossible, under the pleadings and evidence in this case, that the defendant could have a just and equitable right to the possession of the property, or for the jury to so find. It was misleading to the jury, and was the more likely to confuse them because of the fact that the defendant had set up the statute of limitations in his answer, and had introduced evidence to establish the fact of possession for the purpose of sustaining that plea. The instructions relative to the statute of limitations given by the court, while correct declarations of the law as far as they went, were not sufficiently definite and plain to enable us to say that the jury understood therefrom that the bar of the statute of limitations was entirely eliminated from the case. There was greater danger of their being misled by the instruction complained of because of the fact that, unless there remained for their consideration some defense of that character, this instruction would be inconsistent with the other instructions of the court, and not founded upon or applicable to any issue in the case. There was no evidence upon which to base the instruction complained of, and, from the nature of the case, the giving of it at this time was error, and there is no assurance that the error was not prejudicial to the plaintiff. If the jury rendered their verdict upon the theory that the deeds placed in evidence were in fact mortgages for security of debt, the plaintiff was not prejudiced or injured by the instruction; but, if the jury were to render their verdict on the theory that the deeds were in reality mortgages, there

was no occasion for this instruction. The asking of it by the defendant and the giving of it by the court can only be accounted for on the theory that it was intended to say to the jury that, "If you do not find that the deeds are in reality mortgages, yet if you find that the defendant has a just and equitable right to the possession of the premises, although you have found the title to be in the plaintiff, you must find for the defendant." This, being impossible in this case, as above set forth, unless the plaintiff was barred by the statute of limitations from securing his legal rights, would mislead the jury to believe that the defendant was in some way entitled to receive the benefit of the bar of the statute, although the court had legally and in technical terms elsewhere instructed them that he was not. The determination of this question will render unnecessary a consideration of the other points assigned as errors in the appellant's brief.

The judgment of the lower court is reversed, and the cause is remanded for new trial.

Sloan, J., and Davis, J., concur.

[Civil No. 763. Filed March 19, 1902.]

[68 Pac. 537.]

HOSEA G. GREENHAW, Defendant and Appellant, v.
R. J. HOLMES, Plaintiff and Appellee.

1. NEGOTIABLE INSTRUMENTS — NOTES — INTEREST—RATE—WHERE NOT PROVIDED—WHERE PROVIDED—JUDGMENT—BEARS RATE PROVIDED—REV. STATS. ARIZ. 1887, PARS. 2161, 2162, CONSTRUED.— Under paragraph 2161, *supra*, providing that when there is no express agreement fixing a different rate of interest, interest at the rate of seven per cent per annum shall be allowed on notes after maturity, and paragraph 2162, *supra*, providing that parties may agree in writing to any rate of interest on notes, and any judgment rendered on such contract shall bear the rate of interest agreed upon by the parties, a note calling for interest at the rate of one per cent per month, and containing no provision as to the rate after maturity, bears interest after maturity at the stipulated rate, and not at seven per cent per annum.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Affirmed.

The facts are stated in the opinion.

J. L. B. Alexander, and G. P. Bullard, for Appellant.

The parties in specifying the rate of interest, omitted the words "until paid," and no other words were substituted in their place to show that the parties to the note intended that the contract rate of interest therein should continue after maturity until the note should be paid or merged in a judgment. The contract being for interest, the parties should be held strictly to the terms of their contract, which in this case is one per cent per month until due, *not until paid*, and the court should not indulge in doubtful inferences to extend the stipulation for interest beyond the time specified in the written contract. *Newton v. Kennerly*, 31 Ark. 626, 25 Am. Rep. 592; *Brewster v. Wakefield*, 22 How. 118, 16 L. Ed. 301; *Holden v. Trust Co.*, 100 U. S. 74, 25 L. Ed. 567.

J. W. Crenshaw, for Appellee.

All promissory notes or other agreements in writing for the payment of interest on money due or to become due bear the same rate of interest after maturity as is expressed in the written contract, although nothing is expressed about interest after maturity. Rev. Stats. Ariz. 1887, pars. 2161, 2162; *Prigden v. Andrews*, 7 Tex. 461; *Hopkins v. Crittenden*, 10 Tex. 189; *Marietta Iron Works v. Lottimer*, 25 Ohio St. 621; *Monnett v. Sturges*, 25 Ohio St. 384; *Hydraulic Co. v. Chatfield*, 38 Ohio St. 575; *Kerr v. Haverstick*, 94 Ind. 178; *Hume v. Mazelin*, 84 Ind. 574; *Shaw v. Rigby*, 84 Ind. 375, 43 Am. Rep. 96; *Kimmell v. Burns*, 84 Ind. 370; *Phinney v. Baldwin*, 16 Ill. 108, 61 Am. Dec. 62; *Hand v. Armstrong*, 18 Iowa, 324; *Thompson v. Pickel*, 20 Iowa, 490; *Brannon v. Hursell*, 112 Mass. 63; *Varner v. Juif*, 38 Mich. 662; *Meaders v. Gray*, 60 Miss. 400, 45 Am. Rep. 414; *Broadway Savings Bank v. Forbes*, 79 Mo. 226; *Borders v. Barber*, 81 Mo. 636; *Kellogg v. Lavender*, 15 Neb. 256, 48 Am. Rep. 339, 18 N. W. 38; *Hager v. Blake*, 16 Neb. 12, 19 N. W. 780; *Wyckoff v. Wyckoff*,

44 N. J. Eq. 56, 13 Atl. 662; *Cotton Mills Co. v. Burns*, 114 N. C. 353, 19 S. E. 238; *Overton v. Bolton*, 9 Heisk. 762, 24 Am. Rep. 367; *Cecil v. Hicks*, 29 Gratt. 1, 26 Am. Rep. 391; *Spencer v. Maxfield*, 16 Wis. 185; *Jefferson County v. Lewis*, 20 Fla. 981.

DAVIS, J.—The action in the court below was founded upon a promissory note of the tenor following: “\$1,897.00. PHOENIX, A. T., March 8th, 1893. On or before July 8th, 1893, after date, for value received, I promise to pay to the order of R. J. Holmes, Sr., the sum of eighteen hundred and ninety-seven dollars, at Phoenix, A. T., with interest thereon at the rate of one per cent per month, payable annually. [Signed] HOSEA G. GREENHAW.” The district court, by its judgment, allowed interest on this note at the rate of one per cent a month after it became due. The appellant contends that his contract was only for that rate from the date of the note until its maturity, and that but seven per cent was recoverable after that period. This raises the only question presented by the appeal, and its determination involves the correct interpretation of the contract in the light of the statute then in force on the subject of interest. The provisions of law to be considered in this connection are the two following paragraphs, contained in the Revised Statutes of 1887:—

“2161. When there is no express agreement fixing a different rate of interest, interest shall be allowed at the rate of seven per cent per annum on all moneys after they become due on any bond, bill, promissory note, or other instrument in writing, or any judgment recovered in any court in this territory, for money lent, for money due on any settlement of accounts from the day on which the balance is ascertained, and for money received for the use of another.

“2162. Parties may agree in writing for the payment of any rate of interest whatever on money due or to become due on any contract; any judgment rendered on such contract shall conform thereto, and shall bear the rate of interest agreed upon by the parties, and which shall be specified in the judgment.”

These provisions were adopted from the statutes of California, and had already been construed by the supreme court of that state against the view now urged by the appellant. In *Kohler v. Smith*, 2 Cal. 597, 56 Am. Dec. 369, the court

said: "This language is very explicit, and shows that the intention of the act was twofold: First, that money demands after maturity, should draw interest; and, second, that they should draw interest at whatever rate was expressed in the written contract, notwithstanding that nothing is said expressly about interest after maturity; and it is only where no rate is agreed on that the statute rate takes effect. This construction is strengthened by the second section of the act, which requires judgment on such contracts to 'bear the interest agreed upon by the parties'." A like decision has been made in other states upon similar statutes. *Hand v. Armstrong*, 18 Iowa, 324; *Brannon v. Hursell*, 112 Mass. 63; *Marietta Iron Works v. Lottimer*, 25 Ohio St. 621; *McLane v. Abrams*, 2 Nev. 199; *Phinney v. Baldwin*, 16 Ill. 108, 61 Am. Dec. 62; *Hopkins v. Crittenden*, 10 Tex. 189; *Spencer v. Maxfield*, 16 Wis. 185; *Borders v. Barber*, 81 Mo. 636; *Warner v. Juif*, 38 Mich. 662; *Kellogg v. Lavender*, 15 Neb. 256, 48 Am. Rep. 339, 18 N. W. 38; *Wyckoff v. Wyckoff*, 44 N. J. Eq. 56, 13 Atl. 662. While the authorities are somewhat conflicting, the preponderance of opinion in the state courts is clearly in favor of the doctrine that the stipulated rate of interest attends the contract until it is merged in this judgment. This view has also received the sanction of the supreme court of the United States in a case which came before it under a statute of Iowa which bears close resemblance to that of our territory. *Cromwell v. Sac County*, 96 U. S. 51, 24 L. Ed. 681. In the cases from that court where a different rule was apparently applied it will be observed that the local statutes governing interest rates were essentially different from our own. *Brewster v. Wakefield*, 22 How. 118, 16 L. Ed. 301; *Burnhisel v. Firman*, 22 Wall. 170, 22 L. Ed. 766; *Holden v. Trust Co.*, 100 U. S. 72, 25 L. Ed. 567. Certainly the legislature, in providing that the judgment should bear the stipulated rate of interest, could not have had in contemplation that a different rate would prevail between the maturity of the note and the entry of the judgment, nor is it evident that the parties contracting under this statute so intended. The appellant had agreed in writing that the rate of interest for the use of the appellee's money should be one per cent a month. If, in breach of his contract, in violation of his own duty and against the lender's rights, he extended the time, should he not be held to the rate

at which he took the money? Aside from the naked justice of the proposition, the inference seems irresistible that such was the requirement of our law. In other words, the statute meant that the principal of the note should bear the stipulated rate of interest from the time it was due until it was paid, whether payment was made voluntarily or enforced by judgment and execution.

There appears no error in the record, and the judgment of the court below is affirmed.

Sloan, J., and Doan, J., concur.

[Civil No. 759. Filed March 19, 1902.]

[68 Pac. 524.]

THE COBRE GRANDE COPPER COMPANY, Plaintiff
and Appellee, v. WILLIAM C. GREENE et al., Defendants
and Appellees. In the Matter of the Appeal of
AXEL W. HALLENBORG et al., Interveners and Appellants.

1. APPEAL AND ERROR—INTERVENTION—RIGHT OF APPEAL—ONLY APPLIES TO PARTIES TO SUIT—PERSON DENIED PERMISSION TO INTERVENE NOT A PARTY—REV. STATS. ARIZ. 1887, TIT. XIV, CHAP. 2, AND TIT. XV, CHAP. 20, CONSTRUED—SPICER v. SIMMS, 6 ARIZ. 347, 57 PAC. 610, CITED.—An appeal does not lie from an order denying a motion for leave to intervene, the petitioner not being a party to the suit, as the right of appeal granted by the statutes, *supra*, extends only to parties.
2. SAME—SAME—PETITION TO INTERVENE—MERELY MOTION—DENIAL OF —NOT APPEALABLE.—The petition for leave to intervene is only a motion in the cause to which it relates, and not an independent suit which is appealable.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Appeal dismissed.

The facts are stated in the opinion.

John J. Hawkins, J. F. Wilson, and Atwater & Cruikshank, for Appellants.

That under the admitted facts in this case the petitioners were entitled to be allowed to intervene in this suit, see *Anderson v. Jacksonville R. Co.*, 2 Woods (U. S.) 628, Fed. Cas. No. 358; *Fidelity Trust Co. v. Mobile St. R. R. Co.*, 53 Fed. 850; *Bayliss v. La Fayette R. R. Co.*, 8 Biss. (U. S.) 193, Fed. Cas. No. 1140.

The old rule of exclusion of strangers has lost its pristine force, and the federal courts have fairly established the new rule that as far as possible all controversies relating to the subject-matter of the ownership or control of corporate properties should be determined in one action, and for that purpose intervention of strangers to the record, once grudgingly permitted, is now freely allowed and even welcomed. *Grant v. East and West R. Co.*, 50 Fed. 795, 1 C. C. A. 681; *Billings v. Aspen Mining etc. Co.*, 51 Fed. 338, 2 C. C. A. 252; *Farmers' Trust etc. Co. v. Toledo R. Co.*, 67 Fed. 49; *Farmers' Loan and Trust Co. v. Chicago and N. P. R. Co.*, 68 Fed. 412; *French v. Gapen*, 105 U. S. 509, 26 L. Ed. 951; *Williams v. Morgan*, 111 U. S. 684, 4 Sup. Ct. 638, 28 L. Ed. 559; *Tilby v. Hayes*, 27 Hun, 251; *Ithaca Gas-Light Co. v. Treman*, 30 Hun, 212.

That petitioners have the right to appeal from the order of the court denying the application to intervene, see *Farmers' Loan and Trust Co. v. New York etc. Ry. Co.*, 150 N. Y. 410, 55 Am. St. Rep. 689, 44 N. E. 1043, 34 L. R. A. 76; *Williams v. Morgan*, 111 U. S. 684, 4 Sup. Ct. 638, 28 L. Ed. 559; *Stich v. Dickinson*, 38 Cal. 608; *State v. Parish Judge*, 27 La. 184; *Hackettstown Nat. Bank v. Yuengling Brewing Co.*, 74 Fed. 110, 20 C. C. A. 327; *Coffee v. Greenfield*, 55 Cal. 382; *South Spring Co. v. Amador Co.*, 145 U. S. 300, 12 Sup. Ct. 921, 36 L. Ed. 712; *Gaines v. Relf*, 12 How. 472, 13 L. Ed. 1071; *Johnson v. Waters*, 111 U. S. 640, 4 Sup. Ct. 619, 28 L. Ed. 547; *Humes v. Scroggs*, 94 U. S. 22, 24 L. Ed. 51.

Barnes & Martin, L. H. Chalmers, Baker & Bennett, Herndon & Norris, and Robert E. Morrison, for Appellees.

That petitioners have no right of appeal, see *Ex parte Cutting*, 94 U. S. 14, 24 L. Ed. 49; *Lewis v. Baltimore and L. R. Co.*, 62 Fed. 218, 10 C. C. A. 446; *Smith v. Glasgow etc. Co.*, 74 Fed. 332, 20 C. C. A. 432; *Hamlin v. Toledo St. L. and*

K. C. R. Co., 78 Fed. 664, 24 C. C. A. 271, 36 L. R. A. 826; *Credits Commutation Co. v. United States*, 91 Fed. 570, 34 C. C. A. 12.

DAVIS, J.—On the twenty-fifth day of November, 1899, the Cobre Grande Copper Company brought an action in the district court of Maricopa County against William C. Greene, George Mitchell, and the Phoenix National Bank of Phoenix, Arizona Territory, to restrain the said bank from delivering to the said Greene and Mitchell certain title deeds and papers held in escrow, relating to mining property in the republic of Mexico, the right of possession to which was then involved in litigation pending between the plaintiff and said Greene in the courts of Mexico. The plaintiff, claiming rights under a contract from Greene for the purchase of said property, and alleging that it had been prevented from complying with the conditions thereof by the wrongful and fraudulent conduct of Greene and Mitchell, also sought relief in said action to prevent the enforcement of a forfeiture of said contract. An order for injunction was issued by the judge of said court, in accordance with the prayer of the complaint. On July 21, 1900, the plaintiff filed an amended complaint in said action. Separate answers were filed by the defendants Green and Mitchell, raising issues of law and fact, upon which the parties finally went to trial on October 23, 1900. The trial continued through a number of days, and the case was fully submitted to the court for decision on November 1, 1900, when it was taken under advisement. On December 29, 1900, and before a judgment in the case had been rendered, Axel W. Hallenborg and James Shirley applied to the court by petition for leave to intervene and become parties to the suit upon the ground that they were interested therein as creditors and stockholders of the plaintiff company, and that, by a corrupt and fraudulent agreement entered into between the defendants in the suit and the officers of said company, the prosecution of the suit had been stopped, and was in danger of being abandoned. The application for leave to intervene was resisted by the plaintiff, as well as by the defendants Greene and Mitchell, upon several grounds, among which were that it came after the trial of the cause, that it was made for the purposes of delay, that it was not

predicated on facts, and that it failed to show that the petitioners had any interest in the subject-matter of the suit which could be affected by the judgment. The application was denied on February 16, 1901; the court basing its ruling upon the grounds that the petitioners were not interested in the subject-matter of the suit, and that the application for intervention came too late. The petitioners, Hallenborg and Shirley, now bring to this court such portion of the record of the case as they claim properly relates to the question of their right of intervention, and seek to have us review upon appeal the order of the district court denying their application for leave to intervene in said action.

There is objection to our consideration of the appeal, based upon the ground that the order from which it is taken is not appealable. The question of the right of appeal in this case is governed by the provisions of the Revised Statutes of 1887. These statutes contemplate an appeal from a final judgment of the district court, or from any order in the nature of a final judgment. *Spicer v. Simms*, 6 Ariz. 347, 57 Pac. 610. But this right of appeal is manifestly only for parties to the suit. The petitioners asked for permission to intervene and become parties, but their application was denied. Had it been granted, their *status* as parties would have been settled, and they could have appealed from any final judgment rendered against them in the case, or from an order dismissing their intervention. But they never became interveners, and their rights were not adjudicated. The effect of the trial court's order was to leave the petitioners free to assert their rights in any other appropriate form of independent proceeding. The broad field of the courts was still open to them. The petition for leave to intervene is only a motion in the cause to which it relates, and not an independent suit which is appealable. *Ex parte Cutting*, 94 U. S. 14, 24 L. Ed. 49. We are convinced that under the statute no appeal lies from an order denying an application in a pending suit to permit a person to intervene and become a party thereto.

It follows that this appeal cannot be entertained, and the motion to dismiss the same is accordingly granted.

Doan, J., and Sloan, J., concur.

[Civil No. 777. Filed March 19, 1902.]

[68 Pac. 525.]

H. HAUPT, Plaintiff and Appellant, v. MARICOPA COUNTY, Defendant and Appellee.

1. TRIAL—VERDICT—DUTY OF COURT TO DIRECT FOR DEFENDANT—ROOT v. FAY, 5 ARIZ. 19, 43 PAC. 527; ROBERTS v. SMITH, 5 ARIZ. 368, 52 PAC. 1120, APPROVED.—Where the evidence for the plaintiff, taken as true, and in its strongest light against the defendant, presents no case upon which the plaintiff is entitled to recover, the court may instruct the jury to return a verdict for the defendant.
2. COUNTIES—LOCAL SUBDIVISIONS OF TERRITORY FOR GOVERNMENTAL PURPOSES—DUTIES—LIABILITIES.—A county is the local subdivision of a state or territory created by the state for the purposes of government, its functions, political and administrative, having direct relation to the policy of the state. It is possessed of only such powers as the state chooses to give it, can incur no liability except in pursuance of law, and cannot be made to respond for wrongs committed by its officers or agents unless the statute so declares.
3. COUNTIES—BOARD OF SUPERVISORS—POWER—SANITARY REGULATIONS—CONTAGION—DESTRUCTION OF PROPERTY TO PREVENT SPREADING—COMPENSATION TO OWNER OF PROPERTY DESTROYED—CONTRACT—REV. STATS. ARIZ. 1897, PARS. 381, 383, 397, SECS. 19, 25, CONSTRUED.—Paragraph 381, *supra*, provides that "every county is a body politic and corporate, and as such has the power specified in this act and such powers as are necessarily implied from those expressed." Paragraph 383, *supra*, declares that these powers "can only be exercised by the board of supervisors, or by agents and officers acting under their authority, or authority of law." Paragraph 397, *supra*, empowers the board (Sec. 19) to adopt "such provisions for the preservation of the health of their respective counties as they may deem necessary, and provide for the expenses thereof," . . . (Sec. 25) "to make and enforce all such local, police, sanitary, and other regulations as are not in conflict with general laws." Under these statutes a county is liable for a house, and the goods therein, taken by order of the board of supervisors and destroyed under an agreement by the board to reimburse the owner, such action being deemed necessary after consultation with a physician to prevent the spread of a contagious disease.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Reversed.

The facts are stated in the opinion.

Millay & Christy, for Appellant.

A municipal corporation may contract through its agents. *City of McPherson v. Nichols*, 48 Kan. 430, 29 Pac. 679; *Beers v. Dalles City*, 16 Or. 334, 18 Pac. 835; *Carleton v. City of Washington*, 38 Kan. 726, 17 Pac. 656; *Ward v. Town of Forest Grove*, 20 Or. 355, 25 Pac. 1020.

The power to contract through an agent carries also the power to ratify a contract made by one claiming to be an agent. *Town of Durango v. Pennington*, 8 Colo. 257, 7 Pac. 14; *City of Ellsworth v. Rossite*, 46 Kan. 237, 26 Pac. 674.

A. J. Edwards, and Oliver P. Morton, for Appellee.

A public servant appointed for a particular purpose cannot bind a county in contract when such contract is clearly without the apparent scope of his authority. Any one contracting with a public official, agent, or servant is bound to know whether such party has the authority to contract and the scope of that authority. *Packard v. Voltz*, 94 Iowa, 277, 53 Am. St. Rep. 396, 62 N. W. 757; *Coffee County v. Venard*, 10 Kan. 95; *Smith v. Carlton County*, 46 Fed. 340; *Sherbourne v. Yuba County*, 21 Cal. 113, 81 Am. Dec. 151; *Ruffman v. San Joaquin County*, 21 Cal. 427.

For cases holding that contracts of counties are *ultra vires* and void when made under circumstances similar to the case at bar, see *People v. Cazneau*, 20 Cal. 503; *People v. Pico*, 20 Cal. 595; *Miller v. Board of Commissioners*, 4 Idaho, 44, 35 Pac. 712; *Morrell v. Douglass*, 14 Kan. 293; *Noble v. Cain*, 22 Kan. 493; *Wallace v. Mayor of San Jose*, 29 Cal. 188.

DAVIS, J.—On the thirteenth day of October, 1900, the justice of the peace and the constable of Gila Bend, in Maricopa County, telegraphed to the board of supervisors of said county stating that there were a number of cases of diphtheria at Gila Bend, that there was no doctor there, that the parties were unable to send for a doctor, and requesting the board to send a doctor at once. The board sent Dr. Woodruff to Gila Bend, with instructions to do whatever he thought right and proper to eradicate and prevent the spread of the disease. Dr. Woodruff left Phoenix Saturday evening, Oc-

tober 13th, returned Saturday morning, October 20th, and reported to the board on Monday, October 22d, that there had been several very marked cases of diphtheria at Gila Bend, one death while he was there, and one since he left; also stated that he had left orders with the justice of the peace and constable as to whom to quarantine and length of time to quarantine; advised that the county furnish a tent and bedding to sick family, and, as soon as the quarantine is lifted from them, to move them into the tent and burn their house, which is a small affair. The board, after discussion of the matter, adopted the suggestions and recommendations of the doctor, and instructed him to write to the officers in charge what to do in the matter. On October 27, 1900, Dr. Woodruff returned to Gila Bend, moved the family into the tent provided by the county, and, after stating that the appellant herein would be reimbursed by the county for all property destroyed, set fire to and burned the house which had been occupied by the sick family, and all the furniture, household effects, stores, and personal property therein contained. On November 3, 1900, the appellant presented to the board of supervisors of Maricopa County an itemized claim against said county for \$988.08 for the property so destroyed, duly verified as required by the statute, and on November 17, 1900, at a regular meeting of the board, the claim of the appellant was taken up, and, after hearing the evidence of the appellant and Dr. Woodruff, the quarantine doctor mentioned above, and after fully discussing the matter, the board decided to allow the appellant the sum of \$400, and directed the clerk to notify the appellant officially of the award. The clerk of the board sent to the appellant written notice, under the seal of the county, of the award, whereupon he filed, in the district court, this suit against the county for the full amount of the claim. The case was tried to a jury, and, after the plaintiff's evidence was in, counsel for defendant moved for an instruction to the jury to return a verdict for the defendant. For the purpose of this motion, the value of the property was admitted to be as claimed. After argument by the respective counsel, the motion was granted. The jury was so instructed by the court, and thereupon returned a verdict for the defendant, and judgment followed on the verdict. The foregoing is an agreed statement of the facts

in the case for the purposes of the plaintiff's appeal to this court, the evidence at large not being preserved in the record.

Did the court err in directing a verdict for the defendant? It is now well settled in this territory that, where the evidence for the plaintiff, taken as true and in its strongest light against the defendant, presents no case upon which the plaintiff is entitled to recover, the court may instruct the jury to return a verdict for the defendant. *Root v. Fay*, 5 Ariz. 19, 43 Pac. 527; *Roberts v. Smith*, 5 Ariz. 368, 52 Pac. 1120; *Haff v. Adams*, 6 Ariz. 395, 59 Pac. 111. We have therefore to determine whether, under the agreed facts, regarded in their most favorable light for the appellant, a case is presented upon which, as a matter of law, a recovery could be had against the county in its corporate capacity for the destruction of his property. A county is the local subdivision of a state or territory. It is created by the state for the purposes of government. Its functions, political and administrative, have direct relation to the policy of the state. It is possessed of only such powers as the state chooses to give it. It can incur no liability except in pursuance of law. It cannot be made to respond for wrongs committed by its officers or agents unless the statute so declares. The provisions of our territorial law which bear upon the case at bar are to be found under title 13 ("Counties") of the Revised Statutes of 1887. Paragraph 381 provides that "every county is a body politic and corporate, and as such has the power specified in this act, and such powers as are necessarily implied from those expressed." By paragraph 383 it is declared that these powers "can only be exercised by the board of supervisors, or by agents and officers acting under their authority, or authority of law." It is provided by paragraph 397 that "the board of supervisors, in their respective counties, have jurisdiction and power, under such limitations and restrictions as are prescribed by law, . . . (19) to adopt such provisions for the preservation of the health of their respective counties as they may deem necessary, and to provide for the expenses thereof. . . . (25) to make and enforce all such local, police, sanitary, and other regulations as are not in conflict with general laws." With the exception of the further expressed authority to provide for the care and maintenance of the indigent sick, and to erect hospitals there-

for, the two foregoing provisions represent the power of the county in relation to the public health.

The action in this case was based upon contract, it being alleged "that the said property was taken and destroyed by the defendant to prevent the spread of a contagious disease, and the said defendant then and there promised the plaintiff to pay him the full value thereof." The question of the liability of counties for torts, discussed to some extent in the briefs, is not one with which we have to deal. Nor does the case, as we view it, necessarily involve a consideration of the principles which relate to the exercise of the right of eminent domain. It is the theory of the appellant, 1. That the board of supervisors had power under the law, acting for the preservation of the public health, to contract with him for the taking and destruction of his property, and for his reimbursement to the extent of the actual value thereof; 2. That Dr. Woodruff, as the authorized representative of the board, contracted, on behalf of the county, to pay for the said property, and thereupon destroyed the same; and 3. That the board ratified the contract and recognized the county's liability thereunder. Counsel for the appellee strenuously dispute the proposition that the board of supervisors could, under the law, bind the county to a contract of this nature, and insist that such an agreement, if entered into by the board, would be *ultra vires* and void. It is pointed out that a public corporation always possesses the common-law power to abate a nuisance, without liability, even to the destruction of the thing constituting it, and that it is expressly admitted by the complaint in this case "that the said property was taken and destroyed . . . to prevent the spread of a contagious disease." It is not a question here of whether liability could have been avoided by the adoption of a different course of action, but rather, one as to whether, under the law and the procedure taken, an obligation has been created against the county. In addition to the enforcement of suitable police and sanitary regulations, the supervisors are empowered "to adopt such provisions for the preservation of the health of their respective counties as they may deem necessary, and to provide for the expenses thereof." The language used indicates a broad grant of power, and that it was intended to intrust to the board a large discretion concerning the means

to be employed for the preservation of the public health. It would not be the part of wisdom to unduly hamper with restrictions the exercise of so important a function. The prevalence of contagion may require the adoption of different measures, according to the peculiar exigencies of the situation which is presented, and we do not feel justified in prescribing a limitation which might, in effect, tie the hands of the board when the urgency was the greatest. In the case before us, the property destroyed consisted of the house which had been occupied by the sick family, admittedly a "small affair," and its contents of furniture, household effects, stores, and personalty. We are of the opinion, considering the circumstances of this case, that the board of supervisors possessed the requisite power, under the foregoing grant, to contract with the appellant to pay him for the taking and destruction of his property, as the most efficient means for the eradication of the disease with which it was infected. Having such power, we think it is apparent, from the admitted facts, that the evidence of the plaintiff on the trial fairly tended to prove that the board exercised its authority by entering into an agreement to reimburse him for the property which it was about to destroy for the protection of the public health. The question of the sufficiency of the evidence to establish such contract was one which should properly have been left to the jury. We think, therefore, the court erred in peremptorily instructing the jury to return a verdict in favor of the defendant. The judgment of the district court is reversed, and the cause remanded for a new trial.

Sloan, J., and Doan, J., concur.

MEMORANDUM CASES

[Criminal No. 155.]

THOMAS HART, Appellant, v. TERRITORY OF ARIZONA, Respondent.

APPEAL from the District Court of the Third Judicial District in and for the County of Yuma. Webster Street, Judge.

H. C. Davis, and J. B. Woodward, Attorneys for Appellant.
C. F. Ainsworth, Attorney-General, for Respondent.
January 27, 1902. Dismissed.

[Civil No. 769.]

A. REDEWILL, Appellant, v. C. W. STEVENS, Appellee.

APPEAL from the District Court of the Third Judicial District.

No appearance for Appellant.

J. L. B. Alexander, and G. P. Bullard, Attorneys for Appellee.

January 28, 1902. Affirmed on short transcript under par. 1583, Rev. Stats. Ariz. 1901.

[Civil No. 770.]

JOSIAH HARBERT, Appellant, v. GERTRUDE A. HARBERT, Appellee.

APPEAL from the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge.

No appearance for Appellant.

J. L. B. Alexander, and G. P. Bullard, Attorneys for Appellee.

January 28, 1902. Affirmed on short transcript under par. 1583, Rev. Stats. Ariz. 1901.

[Civil. No. 766.]

JAMES G. JAMES, Appellant, v. GEORGE H. APPEL,
Appellee.

APPEAL from the District Court of the First Judicial District in and for the County of Pima. Webster Street, Judge.

Barnes & Martin, and Selim M. Franklin, Attorneys for Appellant.

Hereford & Hazzard, Attorneys for Appellee.

January 29, 1902. Dismissed.

Affirmed. See opinion, 192 U. S. 129; 48 L. Ed. 377.

[Criminal No. 156.]

MIGUEL B. MARQUES, Appellant, v. TERRITORY OF
ARIZONA, Respondent.

APPEAL from the District Court of the Second Judicial District in and for the County of Graham. F. M. Doan, Judge.

C. L. Rawlins, and F. B. Laine, Attorneys for Appellant.

C. F. Ainsworth, Attorney-General, for Respondent.

February 11, 1902. Affirmed.

[Criminal No. 159.]

OTIS H. MOORE, Appellant, v. THE TERRITORY OF
ARIZONA, Respondent.

APPEAL from the District Court of the First Judicial District in and for the County of Santa Cruz. F. M. Doan, Judge.

Walter J. N. McCurdy, and W. J. E. Key, Attorneys for Appellant.

C. F. Ainsworth, Attorney-General, for Respondent.

February 11, 1902. Affirmed.

[Civil No. 778.]

WONG FAT et al., Appellants, v. WOO PARK et al., Appellees.

APPEAL from the District Court of the Second Judicial District in and for the County of Gila. F. M. Doan, Judge.

J. S. Sniffen, and Robert E. Morrison, Attorneys for Appellants.

Edwards & McFarland, Attorneys for Appellees.

February 11, 1902. Affirmed.

[Civil No. 779.]

WILLIAM SIDOW, Appellant, v. RAMON F. BORQUES, Administrator of the Estate of Archie Borques, Deceased, Appellee.

APPEAL from the District Court of the Second Judicial District in and for the County of Gila. F. M. Doan, Judge.

J. S. Sniffen, and Robert E. Morrison, Attorneys for Appellant.

Edwards & McFarland, Attorneys for Appellee.

February 11, 1902. Affirmed.

[Civil No. 782.]

PASQUAL NIGRO, Appellant, v. ALFONZO HIDALGO DE MERCIER, Appellee.

APPEAL from the District Court of the Second Judicial District in and for the County of Gila. F. M. Doan, Judge.

A. R. Edwards, Attorney for Appellant.

J. S. Sniffen, and Robert E. Morrison, Attorneys for Appellee.

February 11, 1902. Affirmed.

[Civil No. 773.]

JAMES A. CARROW, Administrator of the Estate of Fred E. Carrow, Deceased, v. **THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK**, Appellee.

APPEAL from the District Court of the Fourth Judicial District in and for the County of Mohave. Richard E. Sloan, Judge.

No appearance for Appellant.

W. H. Stilwell, Attorney for Appellee.

February 12, 1902. Affirmed on short transcript under par. 1583, Rev. Stats. Ariz. 1901.

[Civil No. 774.]

WILLIAM HEIMROD et al., Appellants, v. **THE SANTA FE PACIFIC RAILROAD COMPANY**, Appellee.

APPEAL from the District Court of the Fourth Judicial District in and for the County of Mohave. R. E. Sloan, Judge.

E. M. Sanford, Attorney for Appellants.

C. N. Sterry, and E. E. Ellinwood, Attorneys for Appellee.

February 12, 1902. Affirmed.

[Civil No. 738.]

MARTIN GOULD, Appellant, v. **THE MARICOPA CANAL COMPANY**, a Corporation, Appellee.

APPEAL from the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge.

W. H. Stilwell, and Kibbey & Edwards, Attorneys for Appellant.

C. F. Ainsworth, Attorney for Appellee.

March 19, 1902. Reversed.

See opinion on rehearing, *post*, p. 429.

[Civil No. 739.]

JAMES D. MARLAR, Appellant, v. THE MARICOPA
CANAL COMPANY, a Corporation, Appellee.

APPEAL from the District Court of the Third Judicial
District in and for the County of Maricopa. Webster Street,
Judge.

W. H. Stilwell, and Kibbey & Edwards, Attorneys for
Appellant.

C. F. Ainsworth, Attorney for Appellee.

March 19, 1902. Reversed.

See decision on rehearing, *post*.

[Civil No. 740.]

TOM BROCKMAN, Appellant, v. THE GRAND CANAL
COMPANY, a Corporation, Appellee.

APPEAL from the District Court of the Third Judicial
District in and for the County of Maricopa. Webster Street,
Judge.

W. H. Stilwell, and Kibbey & Edwards, Attorneys for
Appellant.

C. F. Ainsworth, Attorney for Appellee.

March 19, 1902. Reversed.

See opinion on rehearing, *post*, p. 451.

[Civil No. 785.]

JUAN ESPINOSO, Appellant, v. QUILINO ESPINOSO,
Appellee. W. Y. PRICE, Defendant.

APPEAL from the District Court of the Second Judicial
District in and for the County of Pinal. F. M. Doan, Judge.

Jesse Hardesty, Attorney for Appellant.

W. H. Griffin, and Owen T. Rouse, Attorneys for Appellee.

October 31, 1902. Dismissed.

[Civil No. 804.]

YAVAPAI COUNTY, Appellant, v. JAMES P. STORM,
Treasurer and Ex Officio Tax-Collector of Yavapai
County, Appellee.

APPEAL from the District Court of the Fourth Judicial
District in and for the County of Yavapai. R. E. Sloan,
Judge.

No appearance for Appellant.

James H. Wright, Attorney for Appellee.

October 31, 1902. Dismissed.

[Civil No. 546.]

JAMES L. UTTER et al., as Executors of the Last Will and
Testament of Elizabeth B. Voorhis, Deceased, Plaintiffs,
v. BENJAMIN J. FRANKLIN, et al., Loan Commission-
ers of the Territory of Arizona, Defendants.

ORIGINAL APPLICATION for Writ of Mandamus.

Barnes & Martin, Attorneys for Plaintiffs.

Rochester Ford, and C. F. Ainsworth, Attorney-General,
for Defendants.

October 31, 1902. Writ granted.

VIII Ariz.—8

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
TERRITORY OF ARIZONA
DURING THE YEAR 1903

[Civil No. 807. Filed March 20, 1903.]

[71 Pac. 910.]

**PETER R. BRADY, JR., et al., Defendants and Plaintiffs in
Error, v. COUNTY OF PINAL, Plaintiff and Defendant
in Error.**

1. **APPEAL AND ERROR—RECORD—RULES OF SUPREME COURT.**—There is such a failure to comply with the supreme court rules as to warrant a refusal to consider questions presented for review, where there is no abstract of record, bill of exceptions, statement of facts, or proper transcript of the record filed, and the only papers before the court besides the briefs of counsel, are the original papers in the case, together with the minute entries and the reporter's transcript of the testimony.
2. **SAME — ASSIGNMENT OF ERROR — GROUNDLESS.**—An assignment of error that "The court erred in overruling defendant's demurrer which alleged, among other things, a defective nonjoinder of parties defendant," is groundless, where it appears from the pleadings that no demurrer was filed, but that by answer the point was raised.
3. **SAME—PLEADING—AMENDMENT UPON TRIAL — DISCRETIONARY — REVIEW—ABUSE OF DISCRETION.**—The refusal to allow an amendment to the pleadings near the close of the trial of the case is a matter clearly within the discretion of the court, and its ruling will not be disturbed on appeal, unless it appears that such discretion has been abused.

4. **JUDGMENT—BAR—DIFFERENT PARTIES—ANOTHER CAUSE OF ACTION.**—A judgment in an action based upon a bond given to secure the county for another and distinct term of office of the defendant as treasurer, though for the same office, would not be a bar to a subsequent action on a different bond given by the same official for a separate and distinct term, the parties in the latter action and the cause of action being different.
5. **COUNTY—NAME—BOND—COUNTY TREASURER—BRADY v. TERRITORY,** 7 ARIZ. 12, 60 PAC. 698, FOLLOWED.—“Pinal County” and “County of Pinal” are used interchangeably in the statutes, and either form is a sufficient legal description.
6. **OFFICE AND OFFICERS—BOND—TO TERRITORY—JOINT AND SEVERAL—PROPER FORM.**—A county treasurer’s bond running not to the county, but to the territory of Arizona, and being joint and several, is proper in form.

ERROR to the District Court of the Second Judicial District in and for the County of Pinal. F. M. Doan, Judge. Affirmed.

The facts are stated in the opinion.

Barnes & Martin, for Plaintiff in Error.

The plea of *res adjudicata* may be pleaded at any time before definitive judgment. But it must be pleaded; it cannot be supplied by the court. If it is pleaded in the supreme court, the cause will be remanded at the prayer of the other party for a trial on that plea. *Williams v. Bethany*, 1 La. 315; *Chew v. Keane*, 2 La. 120; *Palmer v. Yarrowborough*, 10 La. 167.

J. E. O'Connor and Robert E. Morrison, for Defendant in Error.

KENT, C. J.—This was an action brought by the county of Pinal, the defendant in error, upon the official bond of Peter R. Brady, Jr., as treasurer of the county, and the sureties on his bond, to recover the sum of \$5,190.80 as damages to the county for the failure of the treasurer to turn over such sum to his successor in office. The defendants interposed a general demurrer, which was overruled by the court, and a trial was had upon the plea of the general issue and certain specific defenses, and a judgment rendered for plaintiff, which is brought here for review by the defendants upon a writ of error.

The condition of the record in this case would amply warrant the court in refusing to consider the questions brought here for review. There is no abstract of the record, bill of exceptions, statement of facts, or proper transcript of the record filed. The only papers we have before us, besides the briefs of counsel, are the original papers in the case, together with the minute entries and the reporter's transcript of the testimony. This is not a compliance with the rules of the court as they have existed with respect to appeals or writs of error.

The assignments of error set forth in the brief, of which there are twenty-two, nearly all fail to comply with the rules of the court requiring a statement of the grounds of the error complained of. As we have, since the submission of this cause, adopted new rules, under the provisions of which it would not seem possible for counsel to be misled hereafter as to the requirements of a proper record to be presented for our consideration, we have determined in this instance to undertake the labor of an examination of the original papers and of the testimony, to ascertain if error has been committed as alleged, where, by an application of the most liberal construction of the rules, the assignments of error make it possible for us to do so.

The first error assigned is in the following terms: "The court erred in overruling defendants' demurrer which alleged, among other things, a defective nonjoinder of parties defendant." An examination of the original pleadings interposed by the various defendants discloses the fact that no demurrer was interposed by any defendant on this ground, and an examination of the brief of the counsel for the plaintiffs in error and the answers in the case shows that the question involved was raised by answer, and not by demurrer, and that it could not have been raised except by answer, since it related to matters not set up in the complaint.

The second, third, and fourth errors assigned are that the court erred in not dismissing the complaint as to certain defendants, the ground, as we gather from the brief, being that these defendants withdrew from the bond, and were released from liability thereby. We are not referred to any testimony in the case which shows that the defendants did in fact withdraw, and an examination of the reporter's tran-

script justifies our conclusion that no such evidence of any withdrawal as is required by the statute was given.

The fifth assignment of error is based upon the second, third, and fourth, and falls with them.

The sixth assignment of error is that the court erred in not allowing the defendants to file an amended answer during the trial of the case. An examination of the stenographer's minutes shows that application to file the amended answer was made near the close of the trial of the case, and was denied. The allowance of an amendment to the pleadings at that stage of the trial was a matter clearly within the discretion of the court, and its ruling will not be disturbed on appeal, unless it appears that such discretion has been abused. The amendment desired was an allegation setting up that a judgment in another action was a bar to a recovery in this action. We find among the original papers in the case what we presume is the amended answer which the defendants desired to interpose. This answer seems to show that the judgment referred to was not a judgment rendered against all the defendants hereto, but a judgment in an action based on another bond given to secure the county for another and distinct term of office of the defendant as treasurer, though for the same official. The parties were not the same, nor the cause of action the same. We have not the judgment-roll in the action sought to be thus made a bar before us, nor is the record preserved in a bill of exceptions or otherwise, but from the allegations in this amended answer and the remarks of the court and counsel upon the offer of the amended answer, and the subsequent offer of the judgment-roll itself in evidence, as shown by the stenographer's minutes, we think the judgment was not a bar, and that the court did not err in refusing in its discretion to allow the amendment, or, as alleged in the seventeenth assignment of error, in subsequently refusing to receive the judgment-roll in evidence. The record is not before us, and we cannot predicate reversible error in this regard upon the suggestions of counsel in their brief.

The next assignment of error referred to in the brief is the eighth. The error assigned is: "The court erred in allowing the plaintiff to offer in evidence the bond of the county treasurer." The objection made, as we gather from the brief, is that the bond is void, inasmuch as it is a bond

given to the "County of Pinal," and not to "Pinal County," and that the latter is the official name, and that there is no such body politic or corporate as the "County of Pinal." We have held that there is no express provision of the statute requiring that the name shall be "Pinal County," and the two forms "Pinal County" and the "County of Pinal" are used interchangeably in the Civil and Penal codes. *Brady v. Territory*, 7 Ariz. 12, 60 Pac. 698. An examination of the complaint, which contains what the court found to be a copy of the bond, shows, moreover, that this bond was not a bond given to the county of Pinal or to Pinal County, but that the bond ran to the territory of Arizona, and was joint and several. Such a bond was proper in form.

None of the other assignments of error, with the most liberal construction, can be said to come within the rules, nor are they referred to in the brief. We do not, therefore, consider them.

We find no error in the record, and the judgment is affirmed.

Sloan, J., and Davis, J., concur.

[Civil No. 797. Filed March 20, 1903.]

[71 Pac. 957.]

**GILA VALLEY, GLOBE, AND NORTHERN RAILROAD
COMPANY, Defendant and Appellant, v. A. J. LYON,
Plaintiff and Appellee.**

1. **RAILROADS—NEGLIGENCE—QUESTION FOR THE JURY.**—Defendant maintained a siding on a trestle, on an up grade, and at the end thereof there was no sufficient obstruction placed to prevent cars running off into a deep ravine. Defendant's freight conductor, in setting out cars on this siding, instead of employing the proper and customary method, which consisted in keeping the locomotive attached until the cars were stopped, allowed them to run on the trestle by their momentum, and it being impossible to stop them by the hand-brakes, one of the cars went over the end of the trestle, killing the brakeman who was riding thereon. *Held*, that whether the premises were reasonably safe, and, if not, whether the negligence

of the railroad contributed to the injury, were questions for the jury.

2. **SAME—SAME—INSTRUCTIONS TO THE JURY.**—Where it appeared that the uniform custom of setting out cars on a siding was to do so with the engine attached, and that the conductor had knowledge thereof, it was error to instruct that it was for the jury to determine whether the railroad was negligent in failing to instruct its employees to set out the cars with the engine attached, and whether it was negligence not to have warned them not to set them out by allowing the cars to run into the siding by their momentum.
3. **SAME—ACTION FOR WRONGFUL DEATH—PROXIMATE CAUSE—FELLOW-SERVANT—INSTRUCTIONS TO JURY.**—In an action against a railroad company for wrongful death of a brakeman, the court, at the request of plaintiff, charged that if the death was caused by the negligence of the conductor, and the negligence of the defendant did not contribute to it, the jury should find for the defendant; but that if the conductor was negligent, and defendant also, and defendant's negligence contributed to the injuries, plaintiff could recover. In the main charge the court did not discuss the question of proximate cause nor was the question presented to the jury whether, if such negligence of the conductor, who it is admitted was the fellow-servant of the deceased, was the direct or proximate cause, the defendant could still be held liable if in any way at fault. A subsequent instruction was to the effect that if the negligence of the conductor was the proximate cause of the accident, and was not coupled with any negligence on defendant's part, plaintiff could not recover. *Held*, that these instructions were erroneous, since the jury were justified in believing that, though the negligence of the fellow-servant was the proximate cause, they might find for the plaintiff if defendant was negligent in any respect, whether such negligence contributed to the injury or not.
4. **SAME—SAME—SAME—SAME—QUESTION FOR JURY—ARIZONA LUMBER AND TIMBER CO. v. MOONEY, 4 ARIZ. 366, 42 PAC. 952, CITED.**—When the proximate cause of an injury is the negligence of a competent fellow-servant, no recovery can be had, even though the place or appliances are defective, and the master is negligent in that respect; and whether the negligence of the fellow-servant was the proximate cause or whether the defendant's negligence was a contributory cause is ordinarily a question for the jury.
5. **SAME—SAME—INCOMPETENCY—INSTRUCTIONS TO JURY.**—In an action for wrongful death of a brakeman, there being no allegation of incompetency or evidence thereof, or that the company had notice of any incompetency, or could have had by the exercise of reasonable diligence, it was error for the court to instruct that if the injury was proximately caused by the conductor of the train without previous notice to the defendant of his incompetency, plaintiff could not recover.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Gila. George R. Davis, Judge. Reversed.

The facts are stated in the opinion.

Frank W. Burnett, for Appellant.

The master's duty to furnish a reasonably safe place for his employees to work in is fully performed when the appliances furnished are reasonably safe when used with ordinary skill and care; and no liability exists if under such circumstances an injury results from an improper use of the appliances by plaintiff or his fellow-servants. *Randall v. Baltimore etc. R. R. Co.*, 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003; *Morris v. Duluth S. S. Co.*, 108 Fed. 749, 47 C. C. A. 661; *Trewatha v. Buchanan etc., Min. Co.*, 96 Cal. 494, 28 Pac. 571, 31 Pac. 561; *Kansas etc. Coal Co. v. Reid*, 85 Fed. 915, 29 C. C. A. 475; *Cincinnati etc. Ry. Co. v. Mealer*, 50 Fed. 727, 1 C. C. A. 633; *Jones v. Granite Mills*, 126 Mass. 84, 30 Am. Rep. 661; *Hussey v. Coger*, 112 N. Y. 614, 8 Am. St. Rep. 787, 20 N. E. 556, 3 L. R. A. 559; *Hogan v. Smith*, 125 N. Y. 774, 26 N. E. 742; *Cleveland etc. Ry. Co. v. Brown*, 73 Fed. 970, 20 C. C. A. 147; *Callaway v. Allen*, 64 Fed. 297, 12 C. C. A. 114.

The master is not liable if the proximate cause of the injury was the fault of another, or of a fellow-servant with plaintiff. *Evansville R. R. Co. v. Henderson*, 134 Ind. 636, 33 N. E. 1021; *Allen v. New Gas Co.*, L. R. 1 Exch. Div. 251; *Conger v. Flint etc. R. R. Co.*, 86 Mich. 76, 48 N. W. 695; *Trewatha v. Buchanan etc. Min. Co.*, 96 Cal. 494, 28 Pac. 571, 31 Pac. 561; *Course v. New York etc. Ry. Co.*, 49 Hun, 609, 2 N. Y. Supp. 312; *Cincinnati etc. Ry. Co. v. Mealer*, 50 Fed. 725, 1 C. C. A. 633; *Morris v. Duluth S. S. Co.*, 108 Fed. 749, 47 C. C. A. 661; *Norfolk and Western Ry. Co. v. Brown*, 91 Va. 668, 22 S. E. 496; *Bull v. Mobile etc. Ry. Co.*, 67 Ala. 206; *Rose v. Gulf etc. Ry. Co. (Tex.)*, 17 S. W. 789; *New York etc. R. R. Co. v. Perriguet*, 138 Ind. 414, 34 N. E. 233, 37 N. E. 976; *St. Louis etc. R. R. Co. v. McClain*, 80 Tex. 85, 15 S. W. 789; *Union Pac. Ry. Co. v. Callaghan*, 56 Fed. 988, 6 C. C. A. 205; *Vizelich v. Southern Pacific Co.*, 126 Cal. 587, 59 Pac. 129.

Falvey & Davis, for Appellee.

"A railroad must use diligence and care to make and promulgate rules which, if faithfully observed, will give reasonable protection to its employees." Bailey on Master and Servant, p. 42; *Abel v. President etc. Co.*, 103 N. Y. 581, 57 Am. Rep. 773, 9 N. E. 325; *Rex v. Pullman Palace Car Co.*, 2 Marv. (Del.) 337, 43 Atl. 247.

Upon the point that the negligence of the company combined with the negligence of fellow-servants renders the company liable, see *Grand Trunk Ry. Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 267; *Morrissey v. Hughes*, 65 Vt. 553, 27 Atl. 205; *Elmer v. Locke*, 135 Mass. 575.

KENT, C. J.—This was an action brought by the appellee for damages for injuries resulting in the death of her son, alleged to have been brought about by the negligence of the defendant railroad company, the appellant in this court. The case was tried before the court and a jury.

The facts adduced upon the trial showed that the defendant, a railroad company, to accommodate the business of a certain mine near Globe, in this territory, built a side-track several hundred yards long, running from the main track for some distance up a steep grade, and near the top of the grade branching into two spurs. At the top of the grade, and where the ground began to be level, these tracks passed under a shed, a structural part of the mine company's plant, for about thirty feet. On ordinary freight box cars passing under the shed brakemen were compelled to stoop or sit down because of the nearness of the top of the car to the roof of the shed. Beyond the shed the tracks were extended upon a trestle about one hundred and ten feet long, and designed for the placing of cars for convenience of loading and unloading at the mine. At the end of this trestle the tracks stopped on the edge of a steep ravine or cañon. In order to place and leave cars on this spur or side track, there being but one connection with the main track, the engine could not go in advance, but the cars had to be pushed up this spur, and, as the incline was steep leading from the main track, with a small engine some speed was at first required in order to reach the top of the incline. At the place where the steep grade ceased, the shed referred to spanned the track in such

a way as to cut off the view between those on the engine and the far end of a train pushed up the incline on the side track. The roof of the shed was so low as to make it difficult to use hand-brakes on the cars while passing through the shed. There was no obstruction placed at the end of the track and trestle which would prevent the cars from going beyond the track and falling into the ravine, except a piece of pine timber of a size twelve by twelve inches, bolted at each end, and screwed to the ties, rising to a height above the rails of ten or twelve inches. The object of this timber was not to serve the purpose of what is known as a "bumping post," and the timber was not sufficient to arrest the motion of cars propelled at even a comparatively slow rate of speed, but was placed there primarily to prevent cars that were stationary on the track, and that might become loosened by accident or otherwise, from running off the track at the end, and was sufficient for that purpose.

The decedent was employed by the defendant company as a brakeman, and had been in its service for about twelve days when he met his death, and during that time he had been frequently on the premises in question, engaged in his duties as a brakeman, but it was not shown that prior thereto he had had experience in the duties required of him. Under ordinary circumstances, in switching cars onto this side track, it was proper and usual to keep the engine attached to the cars until they were stopped at the desired position. At the time of the accident in question, instead of adopting the usual method, the conductor of the freight train upon which the decedent was employed adopted the unusual method, while the train was in full motion, of cutting off two cars from the rest of the train, which was being pushed by the locomotive, intending to let them go in on the side track by their own momentum, and, with the aid of the deceased, who was on the front car, stop them by means of the hand-brakes when they had attained the desired position. When the cars were cut off the train, they were going at a rate of speed estimated by some witnesses as great as six miles an hour. After they had passed through the shed they were still going at such a rate of speed that the deceased and the conductor, who was on the last car, were unable to control them, and the forward car, upon which the deceased was riding, knocked the pine barrier

from its position, and was precipitated with the deceased into the ravine, and the deceased was immediately killed.

There was nothing to show that the deceased was aware of the purpose of the conductor to cut the cars loose from the train, or that, although the deceased knew the premises, he had had sufficient experience either to be aware of the danger of the premises, or to be chargeable with the knowledge of the dangers as a matter of law. Testimony was offered by the defendant to show that the premises were reasonably safe when used in a proper manner, and by the plaintiff to show that they were dangerous, not only when used in a reckless manner, but dangerous even when the work was performed with due care. The evidence, however, tended to show that if the cars had been put in on the side track in the usual manner—that is, by being attached to the engine with the use of air-brakes until the cars had attained the position desired—the accident and injury would not have occurred; and that the accident was brought about by the method adopted by the conductor of the train in cutting off the end cars and sending them upon the side track without the control of the engine. It appeared, also, that this unusual method had been resorted to once or twice before by the conductor, but that the ordinary custom, known to the conductor, who was an experienced man, was to “spot” the cars by means of the engine.

The court denied the motion of the defendant to instruct the jury to return a verdict for the defendant, and the jury returned a verdict for the plaintiff in the sum of five thousand dollars.

The first error assigned is that the court, at the close of the evidence, should have directed a verdict for the defendant; and it is urged that the case comes within the rule that if the evidence, with all the inferences that the jury can justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such verdict if returned must be set aside, then it is the duty of the court to direct a verdict for the defendant. *Randall v. Baltimore etc. R. R.*, 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003. Upon the evidence in this case, however, we cannot say that the jury would not have been justified in returning a verdict for the plaintiff on the ground that the premises provided by the master for the

work to be done were not reasonably safe, if the master's negligence in this respect contributed to the accident. The testimony as to the character of the premises is not so conclusive or undisputed as to make it a question of law for the court, rather than a question of fact for the jury, to decide whether the premises were reasonably safe, and, if unsafe, whether the negligence of the master in that respect contributed to the injury. We think it was not error, therefore, for the court to refuse the direction requested.

We have next to consider the errors assigned in the instructions to the jury given by the court, and in the modification by the court of the instructions requested by the defendant and as so modified given to the jury. At the request of the plaintiff, the court instructed the jury, in effect, that if they believed that the track was not constructed for the purpose of switching cars in the manner in which it was done on the occasion of the injury, but that the track was intended to be used for switching such cars by means of a locomotive engine connected with the cars by air brakes, or, as it was termed, by "spotting" the cars, then they should decide whether the defendant was negligent in failing to notify its employees that the track was constructed for the use in such latter manner, and in failing to require them to use it in such manner, or was negligent in not warning them from using the track in the manner adopted at the time of the accident, and, if the injuries resulted from a failure of the defendant to so warn its employees, or resulted from the negligence of the conductor combined with such failure to warn its employees, the plaintiff was entitled to recover, unless the jury should find against the plaintiff under the subsequent provisions of the charge. We think in this case the question whether the defendant was negligent in failing to make such rules or give such warning as specified should not have been submitted to the jury. The complaint contained no charge of negligence in this respect, and that issue was not properly raised. The evidence showed that the employees worked under standard rules familiar to all railroad men of experience, with which the conductor was familiar, and that to have made such a rule as suggested would have been extraordinary, or, as expressed by one witness, "would have been called a ridiculous order." The evidence further showed that the

conductor had a knowledge of the uniform custom in respect to the method of performing the work which was being done at the time of the accident, and that such custom was not the method employed by him at the time of the accident, but was the method of spotting the cars above referred to. Where such a uniform custom exists, sanctioned by the master, and the employee has knowledge of such custom, the necessity of the adoption of formal rules in respect thereto is dispensed with. *Rutledge v. Missouri Pacific Ry. Co.*, 123 Mo. 121, 27 S. W. 528; *Luebke v. Railway Co.*, 63 Wis. 91, 23 N. W. 136, 53 Am. Rep. 266; *Texas and P. R. Co. v. Campbell* (Tex. Civ. App.), 39 S. W. 1104. And the failure to adopt a rule as to precautions to be observed by his employees is not proof of negligence rendering a master liable to a servant, unless it appears from the nature of the business in which the servant is engaged that the master, in the exercise of reasonable care, should have foreseen the necessity of such precautions. *Morgan v. Hudson River Co.*, 133 N. Y. 666, 31 N. E. 234.

In the instructions given by the court at the request of the plaintiff the court said, in substance, that if the injuries were caused by the negligence of the conductor, and the negligence of the defendant did not contribute thereto, the jury should find for the defendant; but that, if the conductor was negligent, and the defendant was also negligent, in reference to the character of the premises or in the failure to notify its employees with reference to spotting the cars on the track, and such negligence of the defendant contributed to the injuries, then the plaintiff should recover. Except so far as in this case the question of rules or notice is concerned, this instruction correctly stated the law as to the liability of the master for a concurring cause. In the main charge given, the court does not discuss the question of proximate cause, nor, except as above stated, was the question presented to the jury whether, if such negligence of the conductor, who it is admitted was the fellow-servant of the deceased, was the direct or proximate cause, the defendant could still be held liable if in any way at fault.

From the evidence in this case we think the fundamental questions to be determined by the jury in arriving at their verdict, apart from the question of assumed risks, were with respect to the character of the premises as providing a rea-

sonably safe place for the work, and, if unsafe, whether the negligence of the master in that respect or any other contributed to the injury, or whether the injury was proximately caused by the negligence of the fellow-servant. We think, therefore, that the jury would have had the matters to be determined more clearly in mind if the court in its main charge had instructed them specifically as to the freedom from liability of the defendant if the proximate cause of the injury was the negligence of the fellow-servant. The absence of such instruction would not alone be ground for reversal where a charge, as given, correctly interpreted the law in other respects. The defendant, however, requested the court to give to the jury the following instruction: "The court further instructs the jury that if they believe from the evidence that for a year or more prior to the death of Lyon it had been the uniform custom of the employees of the defendant to put its cars on the spur in question by pushing them in with the engine, and under control of the engine, and that said method was reasonably safe in view of the situation of the premises; and that the conductor of said train, H. L. Rigg, was aware of said custom, and knew that said method was reasonably safe, and also knew that to throw said cars in detached from the engine, as was done at the time of the accident, was not a safe method, and that on the occasion of the accident said conductor caused said cars to be thrown in by said unsafe method, and that such act was the proximate cause of said accident, and that said unsafe method was adopted without direction or authority from the defendant, and had not been used more than two or three times before then, the plaintiff cannot recover, although defendant had furnished no written or printed rules governing the operation of trains at that point." The court refused the instruction as requested, but modified it by striking out the words "had not been used more than two or three times before," and inserting in the place thereof "was not coupled with any negligence on the part of defendant company," and gave the instruction so modified. The latter part of the instruction then read: "And that on the occasion of the accident said conductor caused said cars to be thrown in by said unsafe method, and that such act was the proximate cause of said accident, and that said unsafe method was adopted without direction or authority from the defend-

ant, and was not coupled with any negligence on the part of defendant company, then the plaintiff cannot recover, although defendant had furnished no written or printed rules governing the operation of trains at that point." We think the court overlooked the effect of this instruction, as so modified, in its relation to the freedom from liability of the defendant if the negligence of the fellow-servant was the proximate cause. If the act of the conductor was the proximate cause of the injury, then it made no difference with respect to the freedom from liability of the defendant, as a matter of law, whether the negligence of the conductor was or was not coupled with the defendant's negligence. It is, of course, well settled that if the injury was caused both by the negligence of the fellow-servant and the negligence of the master, then the master is liable. His negligence is then a contributory or co-operative cause, for which he is liable. *Grand Trunk Ry. Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266; *Elmer v. Locke*, 135 Mass. 573; *Atchison, T. & S. F. Ry. v. Lannigan*, 56 Kan. 109, 42 Pac. 343; *Morrissey v. Hughes*, 65 Vt. 553, 27 Atl. 205. But when the proximate cause of the injury is the negligence of a competent fellow-servant, no recovery can be had, even though the place or appliances are defective, and the master is negligent in that respect; and whether such negligence of the fellow-servant was the proximate cause, or whether the defendant's negligence was a contributory cause, is ordinarily a question for the jury. *Wood on Master and Servant*, 812; *Vizelich v. Southern Pacific Co.*, 126 Cal. 587, 59 Pac. 129; *Trewatha v. Buchanan G. M. and M. Co.*, 96 Cal. 494, 28 Pac. 571, 31 Pac. 561; *Southern Pacific Co. v. Yeargin*, 48 C. C. A. 497, 109 Fed. 436; *Whitman v. Wisconsin etc. Ry. Co.*, 58 Wis. 408, 17 N. W. 124; *C. N. O. and T. P. Ry. v. Mealer*, 1 C. C. A. 633, 50 Fed. 725; *M. and S. P. Ry. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256; *Norfolk and W. Ry. Co. v. Brown*, 91 Va. 668, 22 S. E. 496; *Edmondson v. Kentucky Central Ry. Co.*, 105 Ky. 497, 49 S. W. 200, 448; *Arizona Lumber and Timber Co. v. Mooney*, 4 Ariz. 366, 42 Pac. 952; *Little Rock and M. R. Co. v. Barry*, 28 C. C. A. 644, 84 Fed. 944, 43 L. R. A. 349. It is the master's duty to provide a safe place to work, but that principle is not applicable where the place becomes dangerous in the progress of the work from the manner in which the work is done, or is made dan-

gerous only by the carelessness and neglect of fellow-servants. *Cleveland etc. Ry. Co. v. Brown*, 20 C. C. A. 147, 73 Fed. 970; *Callaway v. Allen*, 12 C. C. A. 114, 64 Fed. 297; *Hussey v. Coger*, 112 N. Y. 614, 20 N. E. 556, 3 L. R. A. 559, 8 Am. St. Rep. 787; *Hogan v. Smith*, 125 N. Y. 774, 26 N. E. 742. In the instruction as modified and given the jury were justified in believing that, although they should determine that the negligence of the fellow-servant was the proximate cause of the injury, or the place was made unsafe solely by reason of the unsafe method adopted, they might yet find a verdict for the plaintiff, provided only they should find that the defendant was negligent in some respect, whether such negligence contributed to the injury or not. The error in this instruction as given was not so cured by the main charge on the question of concurrent liability that we can say the jury was not misled by it.

The defendant also requested an instruction to the effect that at the time of the injury all the trainmen were fellow-servants with the deceased, "and the law is that, if said injury was proximately caused by the conductor of said train, then the plaintiff cannot recover." The court modified the instruction by inserting after the word "train" the words "without previous notice in the defendant company of the conductor's incompetency, carelessness, or negligence." We think this modification was not correct, in view of the pleadings and the testimony. No allegation is made in the complaint of incompetency on the part of the conductor, or that the master had notice thereof; nor was there evidence, if such incompetency existed, that the company had such notice, or that it could have had such notice by the use of reasonable diligence. We do not think the jury should have had left to them to determine the question of fact as to whether notice was given to the company of any incompetency of the conductor; and if it were proper to leave this question for them to determine, it should not have been left in a form from which the jury might assume as a fact that the incompetency existed.

For the reasons stated, we think the judgment should be reversed and the case remanded to the district court for a new trial.

Sloan, J., and Doan, J., concur.

[Civil No. 792. Filed March 20, 1903.]

[71 Pac. 941.]

JAMES BONTHRON et al., Plaintiffs and Plaintiffs in Error, v. THE PHOENIX LIGHT AND FUEL COMPANY, a Corporation, Defendant and Defendant in Error.

1. DEATH BY WRONGFUL ACT—RIGHT OF ACTION—NON-RESIDENT ALIENS MAY MAINTAIN—REV. STATS. ARIZ. 1887, PARS. 2145, 2149, 2150, CONSTRUED.—Non-resident aliens may institute and maintain an action for injuries resulting in death caused by wrongful act, under paragraph 2145, *supra*, providing that "An action for actual damages on account of injuries causing the death of any person may be brought in the following cases . . .": paragraph 2149, *supra*, providing that "The action shall be for the sole and exclusive benefit of the surviving husband, wife, children and parents of the person whose death shall have been so caused"; and paragraph 2150, *supra*, providing that "The action may be brought by all parties entitled thereto, or by any one or more of them for the benefit of all."

ERROR to the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Reversed.

The facts are stated in the opinion.

J. L. B. Alexander, for Plaintiffs in Error.

That non-resident aliens may bring a suit for death caused by wrongful act, see *Vetaloro v. Perkins*, 101 Fed. 393; *Mulhall v. Fallon*, 176 Mass. 266, 79 Am. St. Rep. 309, 57 N. E. 386, 54 L. R. A. 934; *Luke v. Calhoun Co.*, 52 Ala. 115.

C. F. Ainsworth, for Defendant in Error.

Plaintiffs in error, being non-resident aliens, were not intended to be included among those who were entitled to the benefits of the provisions of title XXXVI of the Revised Statutes of 1887, giving an action for death caused by wrongful act. *Brannigan v. Union Gold Mining Co.*, 93 Fed. 164; *Deni v. Pennsylvania R. R. Co.*, 181 Pa. St. 525, 59 Am. St. Rep. 676, 37 Atl. 558.

KENT, C. J.—The plaintiffs in error brought an action in the district court to recover damages for the death of their son, caused by the alleged negligence of the defendant company. The complaint alleges that the plaintiffs are residents of the province of Ontario, Dominion of Canada, and that the decedent, their son, was of the age of twenty-five years at the time of his death, and left surviving him his parents, these plaintiffs, but no wife or children; that no administrator has been appointed; and that the plaintiffs, being the only parties entitled to bring the action, bring it jointly for the benefit of each. The complaint also sets up facts showing the death, and alleged negligence of the defendant. A demurrer to the complaint on the grounds that the complaint does not state facts sufficient to constitute a cause of action, and that the plaintiffs have no legal capacity to sue, being non-resident aliens, was sustained by the lower court, and judgment entered thereon against the plaintiffs, and the judgment so entered is now brought by writ of error to this court for review.

The only question brought to our attention, and to be decided, is whether the statutes of Arizona confer upon non-resident aliens the right to institute and maintain an action for injuries resulting in death caused by wrongful act. The statutes of the territory applicable, in force at the time this action was instituted, are found in title 36 of the Code of 1887:—

“Sec. 2145. An action for actual damages on account of injuries causing the death of any person may be brought in the following cases: . . .

“Sec. 2149. The action shall be for the sole and exclusive benefit of the surviving husband, wife, children, and parents of the person whose death shall have been so caused. . . .

“Sec. 2150. The action may be brought by all the parties entitled thereto, or by any one or more of them, for the benefit of all.”

It is the established rule that an action against a person for damages for injuries causing death cannot be maintained at common law. In 1846 Parliament passed the Fatal Accidents Act, commonly known as “Lord Campbell’s Act” (9 and 10 Vict., c. 93). In this country from time to time thereafter the several states passed similar acts, differing

generally only in respect to the persons who were entitled to maintain the action, and for whose benefit the same should be prosecuted.

The supreme court of the United States has held, under a similar statute as to liability in New Jersey, that the right to recover may be asserted in New York by an administrator appointed in New York, and the court says: "The advocates of this view [that the right of action is limited to an administrator appointed in New Jersey] interpolate into the statute what is not there, by holding that the personal representative must be one residing in the state, or appointed by its authority. The statute says the amount recovered shall be for the exclusive benefit of the widow and the next of kin. Why not add here, also, by construction, 'if they reside in the state of New Jersey'? It is obvious that nothing in the language of the statute requires such a construction. Indeed, by inference, it is opposed to it. The first section makes the liability of the corporation or person absolute, where the death arises from their negligence. Who shall say that it depends upon the appointment of an administrator within the state?" *Dennick v. Railroad Co.*, 103 U. S. 11, 26 L. Ed. 439.

As is stated in a note on this question in 54 L. R. A. 935, "In regard to the rights of aliens to sue, it is believed that all of the acts passed by the different state legislatures are identical with Lord Campbell's act; that is to say, there is no express provision contained in any of them that the action may be maintained by a non-resident alien." In this country the question whether such action may be so maintained by a non-resident alien has been determined in five instances by the courts; two decisions holding that such action cannot be maintained, and three decisions in favor of its maintenance. The Pennsylvania supreme court, in 1897, in the case of *Deni v. Pennsylvania R. R. Co.*, 181 Pa. 525, 37 Atl. 558, 59 Am. St. Rep. 676, held that the statute was not intended to confer upon non-resident aliens rights of action not conceded to them, or to put burdens upon the citizens of that state, to be discharged for their benefit; that it had no extraterritorial force; that the mother of the decedent, a resident of Italy, was not within the purview of it; and that a construction which would include non-resident alien husbands, widows, children, and parents of the decedent was obviously opposed

to the spirit and policy of the statute. In this case the court bases its decision partly on the ground that as no statute of Italy was shown authorizing the maintenance of a similar action there, a construction should not be given the statute which would confer upon non-resident aliens rights of action not conceded to them or to citizens of this country by the laws of such foreign country.

The federal circuit court in Colorado, in 1899, in the case of *Brannigan v. Union Gold Mining Co.*, 93 Fed. 164, followed the Pennsylvania case, but gave no reasons for its concurrence, except its approval of the reasoning in the Pennsylvania case. In the opinion in each of these cases the statement is made that no case has been brought to the attention of the court in which an English court, in construing the parent act, has held that a non-resident alien is entitled to its benefits; and the lack of such construction by the English courts seems, from the statements in the opinions, to have had much weight in the conclusions reached. At that time, however, there had been several such actions in the English courts, brought by such aliens, where the question had not been raised or decided, and prior to the decision in the Colorado federal court, though not referred to in that opinion, one case, at least, where, the question having been raised, the court had decided against the right of the alien to maintain it.

In 1875 the supreme court of Alabama, in the case of *Luke v. Calhoun County*, 52 Ala. 115, held that a citizen of Great Britain could maintain a similar action; but the act under which the action was brought was a special act to suppress murder, lynching, etc., by which it was provided that certain persons who were injured by a death caused by a riot, etc., could maintain an action against the county; and, though the question involved was substantially the same as here presented, the court based its decision largely upon the purpose intended to be accomplished by the statute,—to wit, the suppression of murder; holding that the purpose of the act would not be accomplished if a distinction was drawn between residents and aliens.

In April, 1900, the circuit court of the United States for the district of Massachusetts, in the case of *Vetaloro v. Perkins*, 101 Fed. 393, construing the Employer's Liability Act of Massachusetts, giving the widow or next of kin a right of

action in certain cases, held in favor of the right of a non-resident alien to maintain the action, disapproving of the decisions in the Pennsylvania and Colorado federal court cases above cited. In the course of the opinion Judge Colt says: "I can find no sound or just reason for holding that the legislature intended to exclude non-resident aliens from the benefits of this section. If statutes of this character have no extraterritorial force, as was held in *Deni v. Pennsylvania R. R. Co.*, *supra*, it is difficult to see why citizens or residents of other states are not excluded as well, in the absence of any constitutional provision." In March, 1900, the supreme court of Massachusetts, in the case of *Mulhall v. Fallon*, 176 Mass. 266, 57 N. E. 286, 54 L. R. A. 934, 79 Am. St. Rep. 309, held the right of action existed in a non-resident alien, following the federal decision in that district. We quote a portion of the opinion of Mr. Chief Justice Holmes: "We come, then, to the more difficult question—whether the plaintiff can claim the benefit of the act. However this may be decided, it is not to be decided upon any theoretic impossibility of Massachusetts law conferring a right outside her boundary lines. In *Manville Co. v. Worcester*, 138 Mass. 89, 52 Am. Rep. 261, where a Rhode Island corporation sought to recover for a diversion of waters from its mill in Rhode Island by an act done higher up the stream in Massachusetts, it was held, following earlier decisions, that there was no such impossibility, although the point was strongly urged. It is true that legislative power is territorial, and that no duties can be imposed by statute upon persons who are within the limits of another state. But rights can be offered to such persons, and if, as is usually the case, the power that governs them makes no objection, there is nothing to hinder their accepting what is offered. The same principle is recognized, without discussion, in *Lumb v. Jenkins*, 100 Mass. 527, where a non-resident alien was held entitled to take land by descent. So, after discussion, as to a non-resident's right to sue. *Peabody v. Hamilton*, 106 Mass. 217."

In England, in 1898, in the case of *Adam v. British and Foreign S. S. Co.*, [1898], 2 Q. B. 430, 67 L. J. Q. B. 844, the court held that the provisions of Lord Campbell's act do not apply for the benefit of aliens abroad, and therefore the representative of an alien whose death had been caused by

the negligence of a British subject outside the jurisdiction of the court could not maintain an action to recover damages in respect of the death; that it is a principle of English law that the acts of Parliament do not apply to aliens unless the language of the statute expressly refers to them; and that, as there is no express intention in the act to give to non-resident aliens the right, such right cannot be inferred from the act.

In 1901, in the King's Bench Division, the question was presented to the court in the case of *Davidsson v. Hill*, 70 L. J. Q. B. 788; and the court held that the representative of an alien, whose death on the high seas was caused by the negligence of a British subject, can maintain an action for damages under Lord Campbell's act, when such alien was, and his representative is, resident in a foreign country. The court, in the opinions rendered by the two justices, disapproves of the reasoning and the conclusions reached by the court in the case of *Adam v. British and Foreign S. S. Co.*, *supra*, and considers and distinguishes the cases relied upon by the court in the latter case to support the view taken by it. The court goes on to say (quoting from the opinion of Mr. Justice Kennedy): "It seems to me, under all the circumstances, and looking at the subject-matter, more reasonable to hold that Parliament did intend to confer the benefit of this legislation upon foreigners as well as upon subjects, and certainly that, as against an English wrong-doer, foreigners might maintain an action under the statutes in question. . . . Here the plaintiff seeks to enforce her claim against an English subject, and I cannot see why she should not do so. If she cannot enforce her claim, we should have this anomaly, as it seems to me: If a foreigner and an Englishman serving on the same ship were both drowned on the high seas by the same collision, negligently caused by an English vessel, the widow of the one could, and the other could not, obtain from the owners of the ship in fault that reparation which our legislation in these statutes has declared to be just. Let me add that the view which I take has the weighty authority of Sir Robert Phillimore in *The Explorer*, L. R. 3. Adm. & Ecc. 289, after argument. The decision in *The Explorer* was, no doubt, overruled by the court of appeal and the House of Lords in *The Vera Cruz*, 9 Prob. Div. 96, 10 App. Cas. 59,

but, as I understand the judgment of the House of Lords, on a different point altogether,—namely, that the court of admiralty had no jurisdiction to entertain an action *in rem* for loss of life under Lord Campbell's act. And it is not, I think, wholly undeserving of notice that in the case of *The Bernina* (1888), 13 App. Cas. 1, which was litigated in 1886 and 1887,—that is, two years after the decision in *The Vera Cruz*,—and was carried up to the House of Lords, one of the two successful claimants of damages under Lord Campbell's act, in an action *in personam* against the owners of the wrongdoing ship, was, as I have ascertained from the admiralty registry of Bagdad, one Habiba Harone Toeg, of Bagdad, the mother (as appears from the statement in the judgment of Lord Esher), the administratrix of Moses Aaron Toeg, a passenger on a ship from London to Bushire, who lost his life in the collision caused by the negligence of the defendants' servants in the course of the voyage, and who, as I presume from his name and his mother's nationality, was himself a foreigner. No question of her right to recover on the ground of nationality, either of herself or of the deceased, was raised by the defendants, and therefore the case is not in any sense a decision in favor of the right. But in a case contested as persistently as this was, it is difficult to suppose that the question would not have been raised, had it been one in which the point could be rightly and successfully taken. I am of opinion that judgment must be for the plaintiff." And quoting from the opinion of Mr. Justice Phillimore: "I have still to consider the decision and reasoning of my Brother Darling in *Adam v. British and Foreign S. S. Co.* That decision is in point, and, if we decide now in favor of the plaintiff, we must disagree with it. It rests mainly, I think, upon the principle that acts of Parliament are to be deemed not to apply to non-resident aliens unless the court is compelled so to apply them. There are a number of decisions upon the construction of the Merchant Shipping Act, 1854, which set forth this principle as applicable to the construction of statutes imposing a burden upon a foreigner. Perhaps the strongest of these is *Cope v. Doherty*, but even in this case the reservation of Lord Justice Knight-Bruce at page 621 of the report in 2 De G. & J. would make me pause. On the other hand, where it is a case of giving a remedy to a foreigner

the decision of Dr. Lushington in *The Milford* (1858), Swab. 362, and the constant practice which has followed upon that decision, is the other way. This latter position is, I think, sound. Our courts are not only open, but open equally to foreigners as to British subjects, and foreigners who have the benefit of the English common law have also the benefit of English statutes. At any rate, where a statute brings the English law into harmony with the law of the foreigner, as in the case of *The Milford*, I think this must be so."

We do not think that in order to entitle an alien to maintain this action specific authority therefor must be granted such alien by the legislature. The act is broad and comprehensive, and by its terms includes any surviving husband, wife, child, or parent, irrespective of their residence or citizenship; and this includes aliens, in the absence of any restrictive legislation. We know of no rule of law that prohibits the legislature from extending such rights to non-resident aliens, or prevents their accepting the same. As Mr. Chief Justice Holmes said, in effect, *supra*, legislative power is territorial, and restricted thereto only so far as it imposes duties on persons outside its jurisdiction, and not in so far as it confers benefits. The object of the act is to extend beyond the limits of the common law the right to recover reparation for a wrong, and we fail to see why, the wrong having been committed, the same reparation should not be made, whether those entitled to it are citizens of a state of our Union, or citizens of that country whose law we have inherited, and whose legislation in this instance we have adopted. In the absence of any constitutional provision, the same principle under which we extend this right to citizens in other parts of our country beyond our territorial limits having the same law in force applies to its extension by us to citizens of another country having the same law in force. An alien can maintain in our courts an action to enforce rights cognizable at common law. A statute authorizing a right of action, if declaratory merely of the common law, in the absence of a specific restriction, would not exclude aliens, or prevent them from availing themselves of its benefits. There is no difference in principle between such a case and a statute which grants rights not cognizable at common law, or extends rights beyond the limits fixed by the common law. In the absence of a specific re-

striction, the legislature must be presumed, by its enactment enlarging rights common to all, to have intended that such enlargement of rights be common to all. We think the doctrine cited by counsel for defendant in error, as quoted approvingly by the supreme court of Pennsylvania in *McCarthy's Appeal*, 68 Pa. St. 217,—“We do not legislate for men out of our jurisdiction,”—is not one that commends itself, or is in accord with the spirit of our age or our institutions, and should not be inferred or read into a statute which in its terms is broad and comprehensive, and contains no suggestion of limitation as to citizenship or residence. A construction of such a statute with respect to its application to rights of aliens thereunder which will include such aliens is more in accord with the liberal policy of our government and the decisions of our courts in regard to the enforcement of their rights, when they grow out of or are connected with commercial interests or business relations. It is not a valid objection thereto to urge, as is urged in this case, that the act is penal in its nature, and its terms should therefore be strictly construed, for, if such were its nature, there is nothing in the terms of the act which excludes an alien, and a literal or strict construction thereof is rather in favor of than against its application to an alien. The supreme court of the United States has held, however, that such an act is not penal, but remedial. *Stewart v. Baltimore etc. R. R. Co.*, 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537.

We think the weight of authority, both in this country and in England, is in favor of the contention of the plaintiffs in error, and that the learned court erred in sustaining the demurrer and entering judgment thereon for the defendant. The judgment is reversed and the case remanded for a new trial.

Sloan, J., Davis, J., and Doan, J., concur.

[Criminal No. 165. Filed March 20, 1903.]

[71 Pac. 920.]

JOSEPH DENT, Defendant and Appellant, v. UNITED STATES OF AMERICA, Plaintiff and Respondent.

1. CONSTITUTIONAL LAW—CRIMINAL LAW—FOREST RESERVES—PRIVATE USE—RULES AND REGULATIONS OF SECRETARY OF INTERIOR—INFRACTION OF—NOT CRIMINAL—ACT OF CONGRESS, JUNE 4, 1897, 30 STATS. 33, UNCONSTITUTIONAL—ACT OF CONGRESS, JUNE 4, 1888, 25 STATS. 166, AMENDING REV. STATS. U. S. SEC. 5388, CITED.—The act of Congress of June 4, 1897, *supra*, providing that the secretary of the interior may make rules and regulations to regulate the occupancy and use of forest reservations and to preserve the forests thereon, and further providing that any violation of such rules and regulations shall be punished as is provided for in the act of Congress of June 4, 1888, amending section 5388 of the Revised Statutes of the United States, is an unconstitutional delegation of legislative power to the secretary of the interior in so far as it authorizes him by rule or regulation to specify acts the performance of which shall constitute crime.

2. SAME—SAME—SAME—SAME—SAME—CRIME—WHAT CONSTITUTES.—It is not enough that the government may have the ownership of the forest reserves, and that its unauthorized use for sheep-grazing be a trespass. There being no offenses against the government at common law, special statutory enactment making the use an offense must be had before a regulation of a department officer can make such use a criminal act; and such a statutory enactment is not to be found in a statute which gives such official the right to make regulations for use, and provides for a punishment for the infraction thereof, unless such use, except as allowed by the regulations, is in terms prohibited.

APPEAL from a judgment of the District Court of the Fourth Judicial District. R. E. Sloan, Judge. Reversed.

Judgment affirmed on rehearing, *post*, p. 413, 76 Pac. 455.

The facts are stated in the opinion.

E. M. Doe, and E. S. Clark, for Appellant.

F. S. Nave, United States Attorney, and J. H. Campbell, Assistant United States Attorney, for Respondent.

A law will not be declared unconstitutional unless its vice is obvious. "If there is a doubt, the expressed will of the legislature will be sustained." *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Chicago and N. W. Ry. Co. v. Dey*, 35 Fed. 866, 1 L. R. A. 744.

It is fundamental that the functions of the legislature must be exercised by it alone, and cannot be delegated. "This, however, is true only in a qualified sense, and the qualifications are rapidly becoming larger. A marked tendency appears in the direction of assigning duties heretofore deemed legislative to other bodies." "There is no constitutional reason why legislative functions which are merely administrative or executive in their character should not be delegated to that branch of the government." "A distinction is drawn between the delegation of the power to make a law, involving necessarily discretion as to what it shall be, and a grant of authority relative to its execution, though the latter involves the exercise of discretion under and in pursuance of law." *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294; *Georgia R. R. Co. v. Smith*, 70 Ga. 694; *Locke's Appeal*, 72 Pa. St. 491, 13 Am. Rep. 716; *Cincinnati etc. R. R. Co. v. Commissioners*, 1 Ohio St. 88.

The United States owns the public domain in every sense as a private owner. *Northern Pacific Ry. Co. v. Lewis*, 162 U. S. 366, 16 Sup. Ct. 831, 40 L. Ed. 1003; *United States v. Tygh Valley etc. Co.*, 76 Fed. 694; *United States v. Williams*, 6 Mont. 379, 12 Pac. 856.

By long acquiescence a license may be implied for the free use of the public lands by the people. *Buford v. Houtz*, 133 U. S. 322, 10 Sup. Ct. 305, 33 L. Ed. 619.

Such license does not ripen into an absolute right. The privilege may be revoked at any time. That is a necessary conclusion from the complete ownership, and from the fact that there is no such thing as an adverse user against the United States; nor does the statute of limitations run against the United States. This is fundamental and needs no citation of authorities. By the setting aside of a reservation from the public lands for any purpose, the land thus reserved becomes immediately severed from the mass of public lands, and is no longer open to the public for any purpose whatsoever except by the specific consent of Congress. *Wilcox v. Jackson*, 13. Pet. 498, 10 L. Ed. 264.

It is a proper delegation of power to place in the discretion of the President the reservation of the public lands. *Wilcox v. Jackson*, 13 Pet. 498, 10 L. Ed. 264.

Subsequent to such reservation any use of grasses or timber, or even the setting of foot upon such reserve, is trespass. *United States v. Tygh Valley etc. Co.*, 76 Fed. 694; *Northern Pacific Ry. Co. v. Lewis*, 162 U. S. 376, 16 Sup. Ct. 831, 40 L. Ed. 1003; *United States v. Williams*, 6 Mont. 379, 12 Pac. 856.

This applies in full force to the grazing of sheep on a public forest reserve. By the mere setting apart of a forest reserve by presidential proclamation under the act of Congress of March 3, 1891, the grazing of sheep thereon becomes such trespass as to entitle the United States to recover damages therefor. *United States v. Tygh Valley etc. Co.*, 76 Fed. 694.

To enact a law penalizing the use of such reservation unless such use be in compliance with rules and regulations to be prescribed by the secretary of the interior; and to authorize the secretary of the interior to make such rules and regulations, the infraction of which is expressly penalized by act of Congress, is not an unlawful delegation of power. *United States v. Ormsbee*, 74 Fed. 208; *United States v. Breen*, 40 Fed. 403; *United States v. Williams*, 6 Mont. 379, 12 Pac. 856; *United States v. City of Moline*, 82 Fed. 592; *E. A. Chatfield Co. v. City of New Haven*, 110 Fed. 788.

Such grant of power is clearly distinguished from an unlawful grant of power, in that Congress itself has defined what acts shall be unlawful, and has itself prescribed a penalty for unlawful acts, while the regulations which the secretary of the interior may make are administrative and in execution of, but not in conflict with, the law itself, and were "specifically authorized thereby and in effectuation of the legislation which created the offense." *In re Kollock*, 165 U. S. 526, 17 Sup. Ct. 444, 41 L. Ed. 813; *United States v. Eaton*, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591; *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294.

The principle of constitutional law forbidding the delegation of legislative power was never intended to have effect to prevent the enactment of a provision that a use or license given should be exercised under rules and regulations to be prescribed by the proper cabinet officer for the protection

of the property of the government. "It would be impossible for Congress to prescribe every detail governing the administration and management of every department of the government; and if it were possible it would not be wise." *United States v. Williams*, 6 Mont. 379, 12 Pac. 856.

"There are many things upon which wise and useful legislation must depend which cannot be known to the lawmaking power, and must, therefore, be subject to inquiry and determination outside of the halls of legislation." *Locke's Appeal*, 72 Pa. St. 491, 13 Am. Rep. 716.

These principles are applied to sustain the delegation to railroad commissioners of the power to determine freight and passenger tariffs and to determine what improvements and additions to the rolling stock, station-houses, and terminal facilities of railroads are reasonable and expedient. Penal statutes supporting such delegated powers are sustained. *Railroad Commissioners' Cases*, 116 U. S. 307, 6 Sup. Ct. 334, 348, 349-1191, 29 L. Ed. 636; *Reagan v. Farmers' Loan and Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1015; *Tilley v. Savannah etc. Ry. Co.*, 5 Fed. 641, 4 Woods, 427; *People v. Delaware etc. Canal Co.*, 32 App. Div. 120, 52 N. Y. Supp. 850; *Chicago and N. W. Ry. Co. v. Dey*, 35 Fed. 866, 1 L. R. A. 744.

KENT, C. J.—On the twenty-fifth day of March, 1902, in the district court of the fourth judicial district of Arizona, a grand jury of the United States presented an indictment against the appellant, charging him with the crime of "pasturing sheep on the public lands in a forest reservation." To this indictment the defendant filed a general demurrer, which was by the court overruled, and a plea of not guilty entered. A verdict of guilty was found by the jury upon the trial, and judgment was entered imposing a fine upon appellant. The appellant filed his motion for new trial and motion in arrest of judgment, each of which was by the court overruled. To all of said rulings appellant excepted, and has perfected and duly prosecuted his appeal to this court.

By the act of June 4, 1897, (30 Stats. 33, [U. S. Comp. Stats. 1901, p. 1540],) Congress provided that: "The secretary of the interior shall make provisions for the protection

against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside, or which may be hereafter set aside, under the said act of March third, eighteen hundred and ninety-one [26 Stats. 1103; U. S. Comp. Stats. 1901, p. 1537], and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservation, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this act or such rules and regulations shall be punished as is provided for in the act of June fourth, eighteen hundred and eighty-eight, amending section fifty-three hundred and eighty-eight of the Revised Statutes of the United States [25 Stats. 166; U. S. Comp. Stats. 1901, p. 3649]. . . . Nothing herein shall be construed as prohibiting the egress or ingress of actual settlers residing within the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the secretary of the interior. Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating and developing the mineral resources thereof: Provided, that such persons comply with the rules and regulations covering such forest reservation." Under this authority the secretary of the interior promulgated certain rules and regulations, among which was one prohibiting the pasturing of sheep on the public lands in a forest reservation, except by his express permission, in the manner in such rule and regulation provided. Under this act and upon this prohibition this indictment and prosecution were founded.

The question raised by this appeal is whether the provision of the statute above quoted is an unconstitutional delegation of legislative power to the secretary of the interior in so far as it authorizes him by rule or regulation to specify acts the performance of which shall constitute crime. It is, of course, a well-settled principle of constitutional law that the law-making power cannot delegate to the executive the power to make laws; that Congress cannot delegate to any of the

executive departments of the government its legislative power. The question to be considered here is whether this act does transfer to the secretary of the interior legislative power. To ascertain this the rule laid down by the supreme court of Ohio, and affirmed and approved by the supreme court of the United States, must be applied. It is stated as follows: "The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." *Cincinnati, Wilmington etc. R. R. v. Commissioners*, 1 Ohio St. 88; *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294. Is this, then, a delegation of authority to make the law, or a delegation of authority and discretion in carrying out the law? In the case of *Field v. Clark*, *supra*, the act of October 1, 1890, (26 Stats. 567,) was construed. That act permitted the free introduction into this country of certain articles, and provided that the President might, by proclamation, suspend such free entry when the country producing and exporting such articles should impose duties on products of this country which the President should deem reciprocally unequal and unreasonable. The court held that the act did not in any real sense invest the President with the power of legislation; that Congress prescribed in advance the duties to be levied, and that what the President was required to do was simply in execution of the act, and that he had no discretion in the matter except in respect to the declaration of the suspension of the act. The opinion of the court upon this question in that case was not, however, concurred in by the chief justice or Mr. Justice Lamar, it being their opinion that the acts to be performed by the President were, in effect, a transfer of legislative power to him.

In the case *In re Kollock*, 165 U. S. 526, 17 Sup. Ct. 444, 41 L. Ed. 813, an act of Congress (24 Stats. 209 [U. S. Comp. Stats. 1901, p. 2228]), was under consideration, which imposed a revenue tax upon oleomargarine, prohibiting its sale in other than unused packages, and conferred upon the commissioner of internal revenue the duty of prescribing the marks, stamps, and brands to be affixed to the packages, and

made it a crime to sell the article without a payment of the tax, or in old packages, or without the prescribed marks and stamps. There the act itself fully defined the criminal offense, and the power conferred upon the commissioner was a matter of detail of administration. The court held the act valid, and not open to the objection that it was unconstitutional as a delegation of legislative power, the regulation being only supplemental to and in execution of the law itself.

In the case of *United States v. Eaton*, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591, the defendant, a wholesale dealer in oleomargarine, was indicted under an act of Congress regulating the manufacture, sale, etc., of oleomargarine. That act contains several sections forbidding particular acts, and imposing in terms, in many of such sections, the penalties for violation of such acts. In section 5 [U. S. Comp. Stats. 1901, p. 2230], among other things, it was provided that every manufacturer of oleomargarine should keep such books and render such returns of material and products as the commissioner of internal revenue might require, but no penalty for a violation of or neglect to perform such acts was specifically contained in that section. There was no provision requiring such acts on the part of a wholesale dealer. Section 18 [U. S. Comp. Stats. 1901, p. 2234] provided that if any manufacturer of oleomargarine or any dealer therein should omit or neglect to do any of the things required by law to be done in the carrying on of his business or by the act prohibited, if there be no specific penalty or punishment imposed by any other section of the act for the neglect or omission, he should pay a certain penalty. Section 20 [U. S. Comp. Stats. 1901, p. 2234], provided that the commissioner might make all needful regulations for the carrying into effect of said act. The commissioner issued a regulation requiring a certain book to be kept by wholesale dealers for monthly returns, and upon the failure of the defendant to keep such book the indictment was based. That case differed from the one at bar in that there was no requirement for the wholesale dealer to do the acts required by the regulations of the commissioner, and no penalty for the infraction thereof was provided, the question in that case being whether the wholesale dealer in oleomargarine who had omitted to keep the book prescribed by the regulation made under authority of section 20 of the

act was liable to the penalty prescribed by section 18 as having omitted or failed to do a thing "required by law in the carrying on or conducting of his business," within the meaning of section 18. The case is therefore not directly in point, but the reasons given by the court in sustaining the demurrer to the indictment are instructive, and we think applicable to the question here involved; and the opinion of the court was quoted approvingly in the two cases which we have previously referred to. Said Mr. Justice Blatchford: "Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a department. It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted 'in violation of a public law, either forbidding or commanding it.' 4 Am. & Eng. Ency. of Law, 642; 4 Blackstone's Commentaries, 5. It would be a very dangerous principle to hold that a thing prescribed by the commissioner of internal revenue as a needful regulation under the oleomargarine act, for carrying it into effect, could be considered as a thing 'required by law' in the carrying on or conducting of the business of a wholesale dealer in oleomargarine, in such manner as to become a criminal offense punishable under paragraph 18 of the act; particularly when the same act, in paragraph 5, requires a manufacturer of the article to keep such books and render such returns as the commissioner of internal revenue, with the approval of the secretary of the treasury, may, by regulation, require, and does not impose, in that section or elsewhere in the act, the duty of keeping such books and rendering such returns upon a wholesale dealer in the article. It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense; and we do not think that the statutory authority in the present case is sufficient. If Congress intended to make it an offense for wholesale dealers in oleomargarine to omit to keep books and render returns as required by the regulations to be made by the commissioner of internal revenue, it would have done so distinctly, in connection with an enactment such as that above recited, made in par. 41 of the act of October 1, 1890 [26 Stats. 567]. Regulations prescribed by the President and by the heads of departments, under authority granted by Con-

gress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."

In the case of *Payne v. United States*, 30 Wash. Law Rep. 791, 20 App. Cas. D. C. 606, the court of appeals of the District of Columbia has recently held that a special regulation of the postmaster-general limiting the class of publications entitled under the act of Congress to second-class rates was an unauthorized exercise of power, the discretion to be exercised by that official being, in the opinion of the court, limited to a question of identification merely of the publications included in the category prescribed by Congress, it not being competent for the postal department to impose additional requirements beyond those specified in the statute.

The precise question presented for our consideration has been passed upon in the federal district courts in the southern district of California, the northern district of California, the district of Washington, and the district of Utah; demurrers to similar indictments having been sustained in those four cases. In the case of *United States v. Dastervignes*, 118 Fed. 199, Judge Beatty, sitting in the circuit court for the northern district of California, held the regulation in question to be valid, and not a delegation to the secretary of a legislative power. It is to be noticed, however, that that case was a bill on the part of the government for an injunction restraining the defendants from pasturing their sheep on a reservation; and, while the learned judge in his opinion considers that a violation of the regulation would subject a defendant to punishment, the precise question here involved was not before the court for consideration, and it is conceived that in a civil action by the government for the protection of its property rights a different principle and different questions may be involved upon which the decision of that court may be sustained, and that the question discussed in the case may not have been necessarily involved.

We think the fatal defect of the act, so far as the question in the case at bar is concerned, is that unlimited power is

given thereby to the secretary of the interior to determine what is and what is not a crime under the act. It is left to his discretion to determine the acts or omissions which shall render all persons amenable to the criminal law. The act does not prohibit the grazing of sheep on forest reserves, and there is no statute which prohibits it. Whether or not in all cases the authority of the several heads of the departments of the federal government to make regulations for their respective departments is limited to the precise and literal terms of the acts of Congress applicable thereto, we think that, in so far as by such regulations an act is defined to be a crime which is not so defined by any public law, and which, without such regulation, would not be a crime, or punishable as such, it is an exercise of lawmaking power, vested by the constitution, not in such official, but in Congress alone, and as such is unconstitutional.

It is strongly urged by counsel for the government that by setting apart this portion of the public lands as a forest reserve it is no longer open for public use; that any implied license for grazing that may have existed was thereby revoked, and that any entry upon the land is a trespass, except as it may be specifically authorized by the secretary; that the government may maintain an action to prevent a threatened trespass, or to recover damages for an accomplished trespass; that, this being so, and inasmuch as a civil remedy was not a sufficient protection for such forest reservation, Congress passed the act in question; that the act throughout proceeds in recognition of the fact that no person has a lawful right on a forest reservation, and modifies the then existing law to the extent that certain uses of the forest reservations may be had subject to the rules and regulations prescribed by the secretary of the interior, and further provides that any other use or an infraction of those rules shall be punished criminally as provided in section 5388 of the Revised Statutes; that the secretary does not prohibit the use of the forest reserve, for that use is already prohibited by the creation of the reserve; he merely declares the existing law in that respect when he prohibits the pasturing of sheep in the forest reserve; and that, as the act itself prescribes that a violation of the act or of such rules shall be punished, any use of the reservation not expressly granted by the secretary is a violation of the

law, and comes within the principle that the rules so promulgated have the force of law, so that persons violating the same are subject to criminal prosecution; and that the act is not a delegation of legislation, but authorizes merely regulations whereby the law may be carried into effect. And in addition to some of the cases we have referred to above, and various cases of timber cutting, we are cited to the cases of *United States v. Ormsbee* (D. C.), 74 Fed. 208, and *United States v. Breen* (C. C.), 40 Fed. 403.

In the case of *United States v. Ormsbee*, *supra*, the defendant was indicted for violating rules prescribed by the secretary of war in relation to the use of public waters and canals, and a motion to quash the indictment on the grounds here urged was denied. But in that case it appears that Congress had by enactment specifically prohibited any use such as the one in question, "unless approved and authorized by the secretary of war," and had made it the duty of the secretary to establish rules and regulations for the use, and had provided that any infraction of such rules should be a misdemeanor, punishable as in the act provided. The distinction between that case and the one at bar is therefore apparent, and it is the difference between the rightful and wrongful exercise of the legislative function. There the act of Congress made any use illegal ~~except as authorized by~~ the secretary by his rules, and made any infraction of the rules punishable. Here the act merely provides that the secretary may make rules for the use of the reservation, and makes any infraction of the rules punishable. The vital element is lacking, since the act does not prevent the use. In the one case, the use being made illegal by statute, the secretary's power is an exercise of administrative function; in the other, the use not being made illegal by statute, the secretary's functions are legislative, if an infraction of his rules constitutes a crime. It is not enough that the government may have the ownership of the reserve, and that its unauthorized use for sheep grazing be a trespass. There being no offenses against the government at common law, special statutory enactment making the use an offense must be had before a regulation of a department officer can make such use a criminal act; and such statutory enactment is not to be found in a statute which gives such official the right to make regulations for use, and

provides for a punishment for the infraction thereof, unless such use, except as allowed by the regulations, is in terms prohibited.

In the case of *United States v. Breen* (C. C.), 40 Fed. 402, by act Aug. 11, 1888 (25 Stat. 424), the secretary of war was authorized to make such regulations as should seem to him necessary to prevent any obstruction or injury to a certain channel in the Mississippi River, and the act provided that any violation of the regulation so made should be punished as therein provided. This was an act of a local nature, and the secretary's authority was clearly limited to promulgating regulations to carry into effect the prevention of the acts prohibited; and the court held that a regulation limiting the speed of vessels was valid, and upheld an indictment founded thereon.

The distinction between these cases and the case at bar is the distinction in a case often cited upon questions of this character,—*Locke's Appeal*, 72 Pa. 491, 13 Am. Rep. 716. "The legislature cannot delegate its power to make the law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend." The same distinction is to be found in the cases arising under the statute relating to the cutting of timber on the public domain, so often before the courts in this part of the country. The use is specifically allowed by the act; the regulation of use merely is given to the department; hence, as was said in *United States v. Williams*, 6 Mont. 379, 12 Pac. 856, "The making of rules and regulations for the protection of timber . . . on the public lands does not trench upon the domain of the legislative department of the government." It is to be noted, further, that in the act under consideration not only is there no direct prohibition of use of the reservations, but their use for all proper and lawful purposes is specifically granted, subject only to the regulations of the secretary covering such reservation. It may be that Congress intended by this act to allow the secretary, in his discretion, to exercise such latitude by his regulations as to say that this or that man, in his discretion, should or should not pasture his sheep on the reservation, on the theory that such regulation, far-reaching though it might be in its effect, was within the general purpose of the

act in relation to the use and occupation of the reservation. Be this as it may, we do not think Congress may lawfully delegate its power so as to authorize the secretary to so specify by such regulation acts which shall constitute a crime, or that an indictment founded thereon can be sustained. This we believe to be the principle to be deduced from the cases in the supreme court of the United States to which we have referred.

The demurrer to the indictment should have been sustained, and the judgment is therefore reversed and the case remanded to the district court, with directions to enter judgment for the defendant.

Davis, J., and Doan, J., concur.

[Criminal No. 169. Filed March 20, 1903.]

[71 Pac. 938.]

ALLEN McLANE et al., Defendants and Appellants, v.
TERRITORY OF ARIZONA, Plaintiff and Respondent.

1. CRIMINAL LAW—LARCENY—DEGREES—JURY—VERDICT—MUST SPECIFY DEGREE—REV. STATS. ARIZ. 1901, PEN. CODE, SECS. 443, 444, 445, 972, 974, CONSTRUED.—Section 443, *supra*, divides larceny into two degrees, and sections 444 and 445, *supra*, define each. Section 972 of the Penal Code, *supra*, provides that "Whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty." Section 974, *supra*, provides that "The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged or of an attempt to commit the offense." Defendant was tried under an indictment charging him with the crime of grand larceny, in the taking of property in value in excess of fifty dollars. The jury brought in a verdict of "guilty as charged in the indictment." *Held*, that a judgment based on said verdict was unwarranted, as, under statute *supra*, the jury must by their verdict find the degree of the crime, where the crime is divided into degrees.

DAVIS, J., dissenting.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Pinal. F. M. Doan, Judge. Reversed.

The facts are stated in the opinion.

Edwards & McFarland, and W. H. Griffin, for Appellants.

In this case contrary to the imperative requirement of the statute the jury found a general verdict of guilty. The jury having failed to find the degree of crime of which the appellants were guilty, the verdict was too indefinite and uncertain to authorize the court to pronounce judgment thereon. *People v. Marquis*, 15 Cal. 38; *People v. Campbell*, 40 Cal. 129; *State v. Rover*, 10 Nev. 388, 21 Am. Rep. 745; *People v. Travers*, 73 Cal. 580, 15 Pac. 293; *People v. O'Neil*, 78 Cal. 388, 20 Pac. 705; *People v. Bannister* (Cal.), 34 Pac. 710; *People v. Cornwall* (Cal.), 35 Pac. 566; *State v. Treadwell*, 54 Kan. 513, 38 Pac. 813; *State v. Scarlett*, 57 Kan. 252, 45 Pac. 602; *Hogan v. State*, 30 Wis. 428, 11 Am. Rep. 575; *Allen v. State*, 85 Wis. 22, 54 N. W. 999; *Colbath v. State*, 2 Tex. App. 391; *Brown v. State*, 3 Tex. App. 295; *Johnson v. State*, 30 Tex. App. 419, 28 Am. St. Rep. 930, 17 S. W. 1070; *Hays v. State*, 33 Tex. Cr. Rep. 546, 28 S. W. 203; *Cobia v. State*, 16 Ala. 781; *Robertson v. State*, 42 Ala. 509; *McGee v. State*, 8 Mo. 495; *Dick v. State*, 3 Ohio St. 89; *Parks v. State*, 3 Ohio St. 101.

E. W. Wells, Attorney-General, for Respondent.

No particular form of verdict is required. The verdict is "Guilty as charged."

If the jury find the defendants guilty of an offense of an inferior degree to that charged, the verdict must specify it, but if the verdict was intended to be guilty of the degree charged, there would be no necessity for specifying it. *St. Clair v. United States*, 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. Ed. 936; *Pointer v. United States*, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208; *Craemer v. State of Washington*, 168 U. S. 124, 18 Sup. Ct. 1, 42 L. Ed. 407.

KENT, C. J.—The indictment under which the defendants were convicted charged them with the crime of grand larceny, in stealing four head of cattle, of the aggregate value of sixty dollars. The jury, by their verdict, found the defendants "guilty as charged in the indictment, and ask mercy of the court."

The Penal Code of Arizona contains the following provision:—

"Sec. 443. Larceny is divided into two degrees, the first of which is termed grand larceny; the second, petit larceny.

"Sec. 444. Grand larceny is larceny committed in either of the following cases: (1) When the property taken is of value exceeding fifty dollars. (2) When the property is taken from the person of another.

"Sec. 445. Larceny in other cases is petit larceny."

Section 972 of the Penal Code provides: "Whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty." Section 974 provides: "The jury may find the defendant guilty of any offense the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense."

Under these provisions of the code, the appellants urge that the verdict of the jury is contrary to law, in that it did not find the degree of the crime of which the defendants were guilty. The indictment specifically charges the defendants with the crime of grand larceny, and sets forth the taking of property of value in excess of the sum of fifty dollars. The defendants being so charged in the indictment, and charged with facts which constitute grand larceny under the code, the question is whether a verdict of the jury of "guilty as charged in the indictment" is a verdict which finds the degree of the crime of which they are guilty, within the meaning of the statute. We think, under the statute, the jury must by their verdict find the degree of the crime, where the crime is divided into degrees, and that in the absence of such finding the judgment of the court based thereon is not warranted. The law contemplates that the jury shall decide upon the degree, and that they shall unequivocally so express themselves in their verdict. It is not sufficient to say that the indictment specifies the degree of crime, and that by reference to it the court can ascertain the degree which the jury found; nor can it be assumed, in spite of the clear instructions of the court on that point, that the jury did pass upon the value of the property taken, or take into consideration the language of the indictment. The intent and purpose of the act is to require the jury to pass upon the degree of the crime, and to register their action definitely in their verdict, and not leave it to be inferred, from reference to the indict-

ment or any other proceeding in the case, what their action in that respect was, and in the absence of such finding in their verdict the verdict is fatally defective.

The supreme court of Pennsylvania has expressed views contrary to this, and has held, in effect, that where an indictment charges the specific facts which, under a statute, constitute a crime in the first degree, a verdict of guilty as charged in the indictment does, in the language of the Pennsylvania statute, "ascertain" the crime to be in the first degree, because "the indictment is thus referred to as forming a part of the verdict, and the latter thus ascertains the facts which, in judgment of law, amount to murder in the first degree." *Johnson v. Commonwealth*, 24 Pa. 389; *White v. Commonwealth*, 6 Bin. 179, 6 Am. Dec. 443; *Commonwealth v. Earle*, 1 Whart. 525. We do not think that this rule is sound, or that the indictment by such reference by the jury under such a statute as is in question here can be made to form a part of the verdict, so that by an examination of it the intent of the jury as to the degree of the crime can be ascertained. It would often lead to much doubt and uncertainty, where there is a close question as to whether the indictment specifically charges the degree of the crime, or the facts constituting the degree. It is contrary to the plain language and spirit of the act, and is opposed to a long line of decisions of the courts of other states having similar statutes. In the case of *People v. Campbell*, 40 Cal. 129, this question came before the court on an indictment charging murder in the first degree. The jury brought in a verdict of "guilty of the crime charged in the indictment." The defendant moved in arrest of judgment on the ground that the verdict was insufficient, on account of its omission to specify the degree of murder. The court held the objection well taken, saying: "After defining the distinction between murder in the first and second degrees, the section proceeds to enact that, in all prosecutions for murder, if the jury shall find the defendant guilty, the verdict shall specify the degree of murder. This injunction of the statute is not limited to any particular class of prosecutions for murder. On the contrary, it is made obligatory on all juries 'before whom any person indicted for murder shall be tried.' It establishes a rule to which there is to be no exception, and the courts have no authority

to create an exception when the statute makes none. We have no right to disregard a positive requirement of the statute, as it is not our province to make laws, but to expound them. . . . The provision of the statute is that 'the jury shall designate by their verdict whether it be murder of the first or second degree.' The word 'designate,' as here employed, does not imply that it will be sufficient for the jury to intimate or give some vague hint as to the degree of murder of which the defendant is found guilty; but it is equivalent to the words 'express' or 'declare,' and it was evidently intended that the jury should expressly state the degree of murder in the verdict, so that nothing should be left to implication on that point. If it be sufficient for the verdict to 'designate' the degree of the crime only by reference to the indictment, it would be equally good in such a case simply to find the defendant guilty, without any express reference to the indictment. . . . But this construction would annul the very letter of the statute, which, as we have seen, requires the jury to 'designate,' or, in other words, to express or declare by their verdict, the degree of the crime. However absurd it may, at the first blush, appear to be to require the jury to designate the degree of the crime, when it appears on the face of the indictment that the offense charged has but one degree, there are plausible, and perhaps very sound, reasons for this requirement." In the case of *Nevada v. Rover*, 10 Nev. 388, 21 Am. Rep. 745, this same question arose upon an indictment similarly charging murder in the first degree; the verdict being, "Guilty as charged." The court held the indictment fatally defective. So in the case of *State v. Moran*, 7 Iowa, 236, the court held such a verdict insufficient, saying: "It is said, however, that the indictment charges the crime of murder in the first degree, and that when the jury, by their verdict, found the defendant guilty as charged in the indictment, they did, in legal effect, ascertain that he was guilty in the degree charged. This argument, however, leaves it to the court to deduce the intention of the jury from a verdict general in its language, whereas the law requires that the jury shall find specifically the fact, whether guilt is of the first or second degree. In the case of *State v. Treadwell*, 54 Kan. 513, 38 Pac. 813, where the information charged burglary in the first degree, and the verdict found the defendant guilty as charged,

without specifying the degree, the supreme court of Kansas said: "It is well settled in this state that a verdict in such a case, though not absolutely void, is so defective that no sentence can be legally entered thereon." To the same general effect are the following decisions: *Hays v. State*, 33 Tex. Cr. Rep. 546, 28 S. W. 203; *McGee v. State*, 8 Mo. 495; *People v. O'Neil*, 78 Cal. 388, 20 Pac. 705; *People v. Bannister*, (Cal.), 34 Pac. 710; *People v. Cornwell*, (Cal.), 35 Pac. 566; *State v. Scarlett*, 57 Kan. 252, 45 Pac. 602; *Hogan v. State*, 30 Wis. 428, 11 Am. Rep. 575; *Colbath v. State*, 2 Tex. App. 391; *Brown v. State*, 3 Tex. App. 295; *Cobia v. State*, 16 Ala. 781; *Dick v. State*, 3 Ohio St. 89; *People v. Travers*, 73 Cal. 580, 15 Pac. 293. In California, following the case of *People v. Whitely*, 64 Cal. 211, 27 Pac. 1104, the supreme court, in a case nearly identical with the one at bar, adopted a different rule in regard to an information charging grand larceny, from the rule laid down in the cases of *People v. Campbell*, *supra*, and *People v. Bannister*, *supra*, where the charge was in the one case murder, and in the other burglary. The court says (*People v. Price*, 67 Cal. 350, 7 Pac. 745): "The only question in the case is whether the crime with which the defendant was charged, and of which he was convicted, is distinguished into degrees. If it is, the verdict of the jury is clearly imperfect and bad under the foregoing section of the Penal Code [section 1157]. By section 486 of the Penal Code larceny is divided into two degrees, the first of which is termed 'grand larceny,' the second 'petit larceny'; and by section 487 grand larceny is committed in either of the following cases: '(1) When the property taken is of a value exceeding fifty dollars; (2) when the property is taken from the person of another; (3) when the property taken is a horse, mare, gelding, cow, steer, bull, calf, mule, jack, goat, sheep, or hog. Sec. 488. Larceny in other cases is petit larceny.' In the case we are now considering the defendant was charged with the crime of grand larceny, inasmuch as he was accused of stealing money from the person of another. It will be observed that the defendant was charged in the information with the crime of grand larceny, and it was further charged that the stolen goods were taken from the person of another. Now, there is, under the law, but one degree of grand larceny—when the property

stolen is of the value of \$50 or \$50,000—and every larceny committed by taking from the person of another is, in its degree, grand larceny. So that, in either aspect of the case, the charge against the defendant was the crime of grand larceny, which, as already remarked, is without degrees, and the verdict of the jury finding the defendant guilty was ‘Guilty as charged’; that is to say, guilty of grand larceny. In the case of *People v. Whitely*, 64 Cal. 211, 27 Pac. 1104, in which the defendant was charged with the crime of grand larceny, the verdict was, ‘Guilty as charged,’ and it was held sufficient. In our opinion, the same rule is justly applicable to the case now before us. There is nothing doubtful or uncertain in the verdict.” We cannot assent to the reasoning of the California court. On an indictment for grand larceny, if the facts warrant it, there may be a conviction for petit larceny. 1 Bishop’s New Criminal Law, par. 799. The California code, as well as our code, has divided larceny into two degrees. It has not labeled them “larceny in the first degree” and “larceny in the second degree,” as in the case of murder, burglary, arson, and other crimes. It calls the degrees “grand” and “petit,” but this is a mere distinction in name, and not in kind. The degrees are there as much as if they were called “first” and “second.” It is as specious to say that because there is but one degree of grand larceny, or no degrees, no finding of the degree is necessary, as it would be so to hold if grand larceny were termed “larceny in the first degree,” or so to hold in the case of murder or burglary in the first degree. It is the same as saying there are no degrees to murder or burglary in the first degree; hence no finding is required. If, as the supreme court of California has said, and, as we believe, correctly, a verdict based on an indictment charging murder in the first degree, or a verdict based on an indictment charging burglary in the first degree, is defective, under the statute, if it does not specify the degree, a similar verdict based on an indictment charging the first degree of larceny must also be defective; and this is true whether in such degree the crime is termed “larceny in the first degree” or “grand larceny.” There can be no distinction in principle between the cases.

We think the statute required that the jury should have found in their verdict the degree of the crime; and because

of their failure so to find the judgment will be reversed and the case remanded to the district court for a new trial.

Sloan, J., concurs.

DAVIS, J., dissenting.—I do not concur in the conclusion reached by a majority of the court in this case. While larceny is divided into two degrees, the crime distinctly charged against the defendants by this indictment was that of grand larceny. The degree was specified in the indictment, and the verdict, "Guilty as charged in the indictment," was a clear and unequivocal affirmation of the truth of every material allegation of the indictment, and a finding that the defendants were guilty of grand larceny. They were not charged with petit larceny, for the value of the property taken was alleged to be sixty dollars. It is true that under the indictment there could have been a conviction of petit larceny if the remaining allegations had been proven, and the evidence had failed to show that the property was of a value exceeding fifty dollars; but this is because of the provision of the statute which permits the jury to "find the defendant guilty of any offense the commission of which is necessarily included in that with which he is charged." A conviction of the lesser offense, however, would have required a different form of verdict from that which was returned. The crime of grand larceny consists of a certain number of indispensable elements. Without them all, it does not exist. With them all, charged in the indictment, and found to be true "as charged," there can be no doubt as to the meaning of the verdict. It is a plain and unambiguous finding of the "degree of the crime" of which they have found the defendants guilty, and I do not think the statute demands more than this. The intention of the jury is clear, the defendants are not prejudiced, and the court is able to pronounce judgment upon the verdict, even though a reference to the indictment is required, as in most criminal cases. I know that there are authorities to support the view which the majority of the court have taken. These adjudications began about the time that murder was distinguished into degrees. Some of the statutes upon which these decisions are based—generally murder statutes—require, in varying

terms, that the jury "shall ascertain in their verdict the degree," "shall designate by their verdict the degree," "the verdict shall specify the degree," etc. Our own statute merely requires that the jury "must find the degree of the crime." They have so found in this case, and it seems to me that the reversal of the judgment is rested upon a refinement of technicality.

[Civil No. 806. Filed March 20, 1903.]

[71 Pac. 961.]

R. H. BURMISTER & SONS COMPANY, a Corporation,
Plaintiff and Appellant, v. THE EMPIRE GOLD MIN-
ING AND MILLING COMPANY, a Corporation, De-
fendant and Appellee.

1. COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.—Where in good faith suit was commenced for an amount within the jurisdiction of the court, and at defendant's instance allegations were stricken from the complaint, thereby reducing the amount in controversy to a sum less than the statutory amount, it was error for the court to dismiss the action on the ground that the amount in controversy was below the jurisdictional limit.
2. WRITTEN INSTRUMENT — CONSTRUCTION — PAROL EVIDENCE — WHEN PROPER IN AID OF.—While it is elementary that the terms of a written instrument cannot be varied by oral proof regarding the same or the intent of the parties, and it is the province of the court to construe such instrument without further proof, where there is no doubt as to the meaning of the language of the instrument, it is also well established that where there is doubt as to what is the meaning of the words used, the court may and should receive proof of the circumstances out of which the written agreement grew and which surrounded its adoption, for the purpose of ascertaining the subject-matter thereof from the standpoint of the parties in relation thereto.
3. ORDER—FOR PAYMENT OF MONEY—CONSTRUCTION.—An employee of defendant gave an order on it as follows: "Please pay to B. Co. the amount due them for my monthly purchases from money due from" defendant, and said order was accepted by defendant. *Held*, that the meaning of said order is not so clear that it referred only to the amount of money due at the time as to justify the court in striking out allegations in the complaint tending to show that the order was understood by the parties as a continuing order.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. R. E. Sloan, Judge. Reversed.

The facts are stated in the opinion.

Herndon & Norris, for Appellant.

E. M. Sanford, for Appellee.

KENT, C. J.—The appellant, a corporation, brought an action against the appellee, a corporation, for the sum of \$440.86; being an amount claimed to be due from the appellee upon the following order on the appellee, drawn by K. H. Sharp, one of its employees: "Prescott, Arizona, September 20, 1900. Mr. S. S. Jones, Manager Empire M. G. Co.: Please pay to R. H. Burmister & Sons Co. the amount due them for my monthly purchases from money due from the Empire M. G. Co. K. H. Sharp." Indorsed: "Accepted. S. S. Jones, Agent." The appellant, in its amended complaint, alleged that on the 20th of September, 1900, the said Sharp was indebted to the plaintiff for goods sold in the sum of \$190.26; that Sharp was desirous to continue purchasing goods of the plaintiff, and plaintiff was willing to sell him goods, provided it could be secured for the indebtedness created, and that thereupon Sharp gave the plaintiff the order referred to, which was accepted by the defendant, the defendant at that time being indebted to Sharp for wages in the sum of \$200; that the order was intended by Sharp and the plaintiff, and so understood by the defendant, the appellee, to be an order by Sharp on the defendant to pay to the plaintiff all moneys which Sharp had then earned and should thereafter earn under his employment with the defendant, to the amount of his indebtedness then due to the plaintiff, or that should thereafter be contracted by Sharp with the plaintiff during his employment with the defendant; that the plaintiff continued to sell goods to the said Sharp on the strength of said order to and until the 10th day of December, 1900, at which date Sharp's employment with the defendant terminated; that the aggregate amount of purchases made by Sharp from the plaintiff was the sum of \$626.09, being for goods sold by plaintiff to Sharp between

September 1 and December 10, 1900; that \$190.26 of that amount had been contracted at the time the order was given, and the balance, \$435.83, was contracted from September 21 to December 10, 1900; that Sharp paid on said account \$54.05, and on the 17th day of November, 1900, the defendant paid to plaintiff on said order the sum of \$130.68; that the defendant's indebtedness to Sharp from September 20, 1900, to November 17, 1900, was \$500; that defendant, instead of paying the amount of its indebtedness to Sharp to the plaintiff on said order, paid all of said indebtedness to Sharp, direct, except the said \$130.68; that by reason of the premises defendant became indebted to the plaintiff in the sum of \$440.86, which amount was still due and owing.

On the defendant's motion, the court struck out from the complaint all the allegations therein contained that had any reference to the continuing effect of the order after the 20th of September, 1900, leaving remaining in the complaint only sufficient allegations to support an action to recover from the defendant the amount due the plaintiff from said Sharp on the 20th day of September, 1900, as therein alleged, to wit, the sum of \$190.26, of which amount, as shown by the complaint, the said Sharp had paid the plaintiff the sum of \$54.05, and the defendant the sum of \$130.68, or a total payment on account of the said indebtedness of \$196.20 of \$184.73. The court thereupon sustained the special demurrer interposed by the defendant on the ground that the court had no jurisdiction over the subject-matter of the action, in that it appeared on the face of the complaint that the amount demanded was less than \$100—the statutory amount necessary for the court to have jurisdiction over the action. Judgment was entered on the demurrer for the defendant, from which judgment the plaintiff appeals to this court.

The third assignment of error of the appellant is as follows: "(3) The court erred in sustaining the demurrer to the jurisdiction of the court on the ground that the amount involved was less than \$100, because it had entertained jurisdiction of the subject-matter, and had made orders in the case, and because the result of the orders of the court previously made in the case in the exercise of its jurisdiction brought about a condition of the record upon which the

demurrer to the jurisdiction was based." It is the well-settled rule that one cannot knowingly allege a fictitious amount for the sole purpose of bringing his case within the jurisdiction of the court, for such would manifestly be a fraud upon the jurisdiction, and when, on motion, such allegations are stricken from the complaint, and the amount left is reduced below the statutory amount, the court should then dismiss the action; it being within the sound discretion of the court to determine whether the object was to evade the law. But based upon the principle that, jurisdiction having once attached, every presumption of law is in favor of its continuance, the generally accepted rule is that where, as in this instance, in good faith a suit is commenced for an amount within the jurisdiction of the court, although that amount be reduced below the original sum, nevertheless the jurisdiction to hear and determine the case, having once attached, remains unaffected. *Rodley v. Curry*, 120 Cal. 541, 52 Pac. 999; 1 Ency. Plead. & Prac. 708, and cases cited.

In this case the amount claimed in the complaint, as shown by the allegations in the body of the complaint, was for a sum greater than \$100—the amount necessary, under the statute, to give the court jurisdiction. The court entertained the motion of the defendant to strike out certain portions of the complaint, and granted the motion. The complaint, with these portions stricken therefrom, left a cause of action less in amount than the statutory sum of \$100. Thereupon, on a special demurrer interposed, the court dismissed the action for want of jurisdiction, because the amount involved was less than \$100. In this we think the court erred. The amount originally claimed in the complaint gave the court jurisdiction, and, the jurisdiction having attached thereby, the fact that the subsequent proceedings reduced the amount claimed to a sum less than the statutory amount was not a valid reason for the dismissal of the action. The jurisdiction having attached, there being no question as to the good faith of the plaintiff or fraud upon the court, the plaintiff was entitled to a trial on the remaining issues.

This brings us to the questions raised by the first and second assignments of error, wherein it is claimed the court erred in striking out the allegations of the complaint as above stated. The question to be determined in this regard is

whether the court was right in construing the order accepted by the defendant to mean that the defendant thereby became obligated to pay to the plaintiff only the amount due to the plaintiff from Sharp on the date of the order, to wit, the 20th day of September, 1900, or whether the court should have permitted the plaintiff to introduce evidence showing the circumstances surrounding the making of the contract and the situation of the parties, to ascertain whether or not the order should be so construed. It is, of course, elementary that the terms of a written instrument cannot be varied by oral proof regarding the same, or the intent of the parties, and that it is the province of the court to construe such instrument without further proof, where there is no doubt as to the meaning of the language of the instrument; but it is also the established rule that, where there is doubt as to what is the meaning of the words used, the court may and should receive proof of the circumstances out of which the written agreement grew, and which surrounded its adoption, for the purpose of ascertaining the subject-matter thereof from the standpoint of the parties in relation thereto. In this connection Mr. Taylor has said: "Whatever be the nature of the document under review, the object is to discover the intention of the writer, as evidenced by the words he used, and in order to do this the judge must put himself in the writer's place, and then see how the terms of the instrument affect the property or subject-matter. With this view, extrinsic evidence must be admissible of all the circumstances surrounding the author of the instrument. . . . It may, and, indeed, it often does, happen that, in consequence of the surrounding circumstances being proved in evidence, the courts give the instrument thus relatively considered an interpretation very different from what it would have received had it been considered in the abstract. But this is only just and proper, since the effect of the evidence is not to vary the language employed, but merely to explain the sense in which the writer understood it." Taylor, Evidence, secs. 1082-1085. In the case of *Reed v. Insurance Co.*, 95 U. S. 23, 24 L. Ed. 348, the case turned upon the construction to be given a clause in an insurance policy as follows, "The risk to be suspended while vessel is at Baker's Island loading, . . ." and turned upon the point whether the clause meant while the vessel was at Baker's

Island for the purpose of loading, or while it was at said island actually loading. Mr. Justice Bradley, in delivering the opinion of the court, said: "A strictly literal construction would favor the latter meaning [actually loading]. But a rigid adherence to the letter often leads to erroneous results, and misinterprets the meaning of an instrument. That such was not the sense in which the parties in this case used the words in question is manifest, we think, from all the circumstances of the case. Although a written agreement cannot be varied (by addition or subtraction) by proof of the circumstances out of which it grew and which surrounded its adoption, yet such circumstances are constantly resorted to for the purpose of ascertaining the subject-matter, and the standpoint of the parties in relation thereto. Without some knowledge derived from such evidence, it would be impossible to comprehend the meaning of an instrument, or the effect to be given to the words of which it is composed. This preliminary knowledge is as indispensable as that of the language in which the instrument is written. A reference to the actual condition of things at the time, as they appeared to the parties themselves, is often necessary to prevent the court, in construing their language, from falling into mistakes, and even absurdities." And the court held, from the circumstances in the case, that the meaning of the clause was that the risk was sustained while the vessel was at the island for the purpose of loading. In the case before us we do not think that the language of the order is so clear that the court was justified in placing the construction upon it that the order referred only to the amount of money due at the time, without taking into consideration the surrounding circumstances out of which it grew. While it is true that the language used is, "The amount due"—and this would, by strict construction, mean the amount then due—such a construction is in some respects negatived by the words "monthly purchases," which may have meant purchases made monthly in the past, or purchases to be made monthly in the future. We think that the facts in this connection, surrounding the circumstances out of which the transaction arose, would have aided the court in determining whether or not the construction placed upon the order was or was not correct, and the intention of the

parties, and that the plaintiff was entitled to go to trial upon the complaint as it originally stood, and to give such evidence of the facts surrounding the giving, as well as the acceptance, of the order, as would be competent and material in determining the construction to be put thereon. The court therefore erred in striking out the portions of the complaint which would have enabled the plaintiff to introduce such proof.

The judgment is reversed, and the cause remanded to the district court for a new trial in conformity with the views expressed.

Doan, J., and Davis, J., concur.

[Civil No. 789. Filed March 20, 1903.]

[71 Pac. 900.]

A. Y. GREER, Defendant and Plaintiff in Error, v. MERCEDES DOWNEY, Plaintiff and Defendant in Error.

1. CONSTITUTIONAL LAW—ANIMALS—TRESPASSING—SALE FOR DAMAGES—DUE PROCESS OF LAW—LAWS ARIZ. 1893, P. 32, ACT NO. 41, SEC. 4 ET SEQ., HELD VOID—REV. STATS. U. S., SEC. 1851, (ORGANIC ACT, REV. STATS. ARIZ. 1901, PAR. 15), CITED.—Act No. 41, *supra*, providing for no-fence districts, and making it unlawful for any animal to run at large therein, and providing in section 4 and subsequent sections that the owner of any property may detain all animals doing damage on such property and turn them over to a poundkeeper, and if the damages, costs, and expenses of keeping the animals are not paid and the animals claimed within ten days after the posting of certain notices therein provided, the poundkeeper shall sell such animals at public auction to the highest bidder, the proceeds of the sale, after deducting damages, costs, and expenses, to be deposited to the credit of the county school fund, is repugnant to the constitution and void, as a deprivation of property without due process of law, in so far as it authorizes a seizure and sale and a payment of a private claim for damages for trespass without judicial proceedings to determine the amount of damages or whether the animals were in fact running at large within the meaning of the act.

ERROR to the District Court of the Third Judicial District in and for the County of Yuma. Webster Street, Judge. Affirmed.

The facts are stated in the opinion.

Peter T. Robertson, for Plaintiff in Error.

H. C. Davis, for Defendant in Error.

KENT, C. J.—This action was brought by Mercedes Downey, the defendant in error, for the recovery of the value of a horse claimed by her, which had been impounded and sold to the plaintiff in error, the defendant in the action, by the poundkeeper of the justice precinct, under act No. 41, page 32 of the Laws of 1893. Judgment was entered in the court below in favor of the plaintiff upon an agreed statement of facts, and that judgment is brought to this court for review by writ of error.

The agreed statement of facts shows the compliance in every particular with the requirements of the act, and the regularity of the impounding and sale; and the only question to be determined in this court is whether or not the act is constitutional. The act in question provides that a majority of all the taxpayers residing in any justice precinct in the territory may petition the board of supervisors of the county in which such precinct is situated, expressing their desire that no fence shall be required around the lands in such precinct, and that, after the filing of such petition and due publication thereof, no fence shall be required around the lands in such precinct, and it shall be unlawful for any animal to run at large in such precinct thereafter. By section 2 of the act the constable of the precinct is made the poundkeeper of the precinct, and by section 3 it is provided, if any neat cattle, horses, etc., shall trespass or do any damage upon the premises of any person in such justice precinct, an action against the owner of the trespassing animals may be maintained. By section 4 and subsequent sections the act further provides that the owner of any property may detain all animals doing damage on such property and turn them over to the poundkeeper, who shall examine all marks or brands on them, and post notices containing a description of the animals, the amount of damages and costs for which they are detained, and the date and place at which they shall be sold, and such other information as the poundkeeper may deem advisable to bring the attention of the owner of the animals to the detention of the same. If the damages, costs, and expenses of keeping the animals are not paid and the animals claimed

within ten days after the posting of such notices, the pound-keeper shall sell such animals at public auction to the highest bidder, the proceeds of the sale, after deducting damages, costs, and expenses, to be deposited with the county treasurer to the credit of the school fund of the county, provided that the owner of the animal, upon satisfactory proof of such ownership within six months of the date of sale, may obtain from the county treasurer the net proceeds of the sale. By the Organic Act, Congress has provided that "the legislative power of the territory extends to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States." Rev. Stats. U. S., sec. 1851. It is claimed that the act of 1893 in question authorizes a deprivation of property without due process of law, and hence is unconstitutional. The supreme court of the United States has held that a statute which enacts that a railroad company shall be responsible in damages for property along its line of road destroyed by fire communicated from its locomotive engines is constitutional (*St. Louis and San Francisco Ry. Co. v. Mathews*, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611); and that a statute which provides that a person driving a herd of cattle along a highway running on a hillside shall be liable for damages done by such cattle, in destroying the banks or rolling rocks onto such highway, is constitutional (*Jones v. Brim*, 165 U. S. 181, 17 Sup. Ct. 282, 41 L. Ed. 677). So the supreme court held valid a statute authorizing the recovery of double the value of stock killed by a railroad which failed to erect a fence, saying that, from its former adjudications, "it is evident that the fourteenth amendment does not limit the subjects in relation to which the police power of the state may be exercised for the protection of its citizens." *Minneapolis etc. Ry. Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. Ed. 585. It has been held that a statute providing that animals running at large on the public highway may be seized by any one, and sold by a public officer to pay the expenses incurred, is valid as a proper exercise of police power. *Campau v. Langley*, 39 Mich. 451, 33 Am. Rep. 414. And it has been repeatedly held that a city charter, as an exercise of police power, may provide for the taking up and impounding of animals found running at large in the public streets, and for their sale to pay expenses,

without judicial proceedings, and in some cases without notice to the owner. *Commonwealth v. Alger*, 7 Cush. 85; *Wilcox v. Hemming*, 58 Wis. 144, 15 N. W. 435, 46 Am. Rep. 625; *Burdett v. Allen*, 35 W. Va. 347, 13 S. E. 1012, 14 L. R. A. 337; *Coyle v. McNabb* (Tex. App.), 18 S. W. 198; *Rose v. Hardie*, 98 N. C. 44, 4 S. E. 41; *City of Paris v. Hale*, 13 Tex. Civ. App. 386, 35 S. W. 333; *Wilson v. Beyers*, 5 Wash. 303, 32 Pac. 90, 34 Am. St. Rep. 858; *Varden v. Mount*, 78 Ky. 86, 39 Am. Dec. 208. It has also been held that a law authorizing the seizure of animals trespassing upon private property, and authorizing proceedings for their condemnation, and giving the person injured a lien on the cattle, is constitutional (*Cook v. Gregg*, 46 N. Y. 439; *Campbell v. Evans*, 45 N. Y. 356); and so when such seizure is followed by a sale by an officer to pay the expenses (*Anderson v. Locks*, 64 Miss. 283, 1 South. 251); and, further, that an act of the legislature making it unlawful for animals to run at large in a county is valid (*Haigh v. Bell*, 41 W. Va. 19, 23 S. E. 666, 31 L. R. A. 131).

It will be observed, however, that in these cases, and in all the cases we have examined on this subject, no court has held that a legislature has acted within the limits of its authority when it has attempted to authorize by such an act as is now in question, in the manner therein provided, a recovery or a recompense for damages suffered by an individual by reason of the trespass by animals at large upon his private property. We have not before us the question whether the legislature has the power to pass an act restricting the running at large of animals, and providing that they be impounded and sold by an officer upon such notice as may be proper, to meet the charges of impounding if not paid. Such control and the regulation of conflicting interests of stockmen and farmers, if deemed advisable, is a proper exercise of legislative authority, when confined thereto. Nor do we pass upon the question whether the legislature, in the act before us, has not properly provided by section 3 thereof for an action on the part of the farmer against the owner of animals trespassing upon his lands, and thereby has adopted and declared for this territory the common-law rule with respect thereto. Neither do we pass upon the validity of this section of the act. The objectionable feature of the act is that, independent of any pro-

ceeding contemplated by section 3, the poundkeeper is authorized by subsequent sections of the act, without any judicial proceedings for the purpose of ascertaining either the amount of the damages or whether the animal was in fact running at large within the meaning of the act, to sell to satisfy the private claim of the landowner for damages for the trespass.

We have no doubt that the portion of the act which authorizes a seizure and sale and a payment of damages claimed for the trespass without judicial process or proceedings other than as provided for in the act is a deprivation of property without due process of law, and as such is repugnant to the constitution. Such is the logical deduction to be made from the reasoning of the courts in the cases cited above, with which we are in accord; and, in addition thereto, questions nearly identical have been so determined by the courts of last resort in New York and Texas. *Rockwell v. Nearing*, 35 N. Y. 302; *Armstrong v. Traylor*, 87 Tex. 598, 30 S. W. 440.

The decision of the trial court was right, and the judgment is affirmed.

Sloan, J., Davis, J., and Doan, J., concur.

[Civil No. 799. Filed March 20, 1903.]

[71 Pac. 963.]

CARL C. L. WULFF, Plaintiff and Appellant, v. L. LINDSAY et al., Defendants and Appellees.

1. PLEADINGS—HARMLESS ERROR—LEVY v. LEATHERWOOD, 5 ARIZ. 244, 52 PAC. 359, CITED.—No prejudicial error was committed by the court in overruling a demurrer to defendant's plea in abatement and a motion to strike, where it subsequently overruled the plea and denied the motion.
2. BROKERS—COMMISSIONS—STATUTE OF FRAUDS—CONTRACTS.—An agreement by a purchaser to pay an agent the sum claimed to be due from the seller as commission for procuring a purchaser, not being in writing, is void under the statute of frauds.
3. CONTRACTS—PAST CONSIDERATION.—Services rendered in the past, without express or implied request of the person benefited by them, will not support a subsequent oral promise to pay for them.
4. BROKERS—COMMISSION—CONTRACTS—CONSIDERATION.—An agreement entered into at the time of purchase after the services were ren-

dered between the purchaser, the seller, and an agent claiming commissions for procuring for the seller a purchaser, that the purchaser and seller would pay the commissions, is not supported by a valid consideration as against the purchaser.

5. **SAME—SAME—SAME—WRITTEN—CANNOT BE VARIED BY PAROL TESTIMONY**—**ADAMS v. O'CONNOR**, 6 ARIZ. 404, 59 PAC. 105; **BUERMISTEER v. EMPIRE GOLD ETC. CO.**, ANTE, p. 158, 71 PAC. 961, CITED.—An agreement providing that defendant should pay plaintiff a certain commission on any sale "made through him, or to pay the same percentage on any sale made through a certain bond or agreement made to Robert Hennigan of this date on certain mining properties in said agreement in Ures District, state of Sonora, Mexico," will not sustain an action for commission on a sale made through plaintiff of mines situated in the district of Arispe.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Santa Cruz. Geo. R. Davis, Judge. Affirmed.

Docketed and dismissed with costs, 196 U. S. 642, 49 L. Ed. 632.

The facts are stated in the opinion.

Barnes & Martin, and Francis M. Hartman, for Appellant.

Rochester Ford, for Appellees.

KENT, C. J.—In this case a complaint was filed by the plaintiff and answered by the defendants. Later an amended complaint was filed, and the defendants filed an answer to the amended complaint, setting up a plea in abatement and a motion to strike, both of which were not contained in the answer to the original complaint. The plaintiff demurred to these pleas on the ground that they were interposed too late, as they were not contained in the original answer. This demurrer was overruled by the court, and the plaintiff in his appeal assigns as error this action of the court in so overruling his demurrer to the answer. The record shows that the trial court subsequently overruled the plea in abatement and denied the motion to strike. The plaintiff, therefore, even if the action of the trial court complained of was incorrect, which we do not determine, was in no respect prejudiced thereby. No ground for reversal is therefore presented. *Levy v. Leatherwood*, 5 Ariz. 244, 52 Pac. 359.

This action was brought to recover commissions alleged to have been due the plaintiff for his services as a broker in bringing about the sale of certain mining property under a certain contract made between the plaintiff and the defendant Lindsay, the owner of the property, whereby he was to receive twenty per cent of the purchase price. He joined as a co-defendant with the seller, Lindsay, the purchaser of the property, one Schmidt, and alleged in his complaint that at the time of the purchase of the property by Schmidt from Lindsay he told Schmidt he was to receive twenty per cent of the purchase price, and that Schmidt then and there agreed with the plaintiff and with Lindsay that, in consideration for the services theretofore rendered to them jointly and severally by the plaintiff, they would pay to the plaintiff twenty per cent of the purchase price, and prayed judgment against both the defendants.

The trial court sustained the demurrer of the defendant Schmidt to the complaint, and judgment was entered dismissing the complaint as against the defendant Schmidt. The appellant assigns this ruling of the court as error. If this agreement on the part of Schmidt is to be considered an agreement to pay the plaintiff an amount claimed to be due him from the defendant Lindsay, it, not being in writing, was void under the statute of frauds. If it was an agreement to pay for the services rendered them jointly in bringing the parties together, and in the negotiations leading up to the sale, the agreement, as alleged in the complaint, being made at the time of the purchase, after the services were rendered, and for services theretofore rendered, the consideration therefor was what is generally termed, though perhaps loosely, an executed or past consideration. It is a general rule that does not need the citation of authorities that services rendered in the past, without the express or implied request of the person benefited by them, will not support a subsequent oral promise by him to pay for them; and such exceptions as there are to the rule are not within the facts as pleaded in this case. The demurrer of the defendant Schmidt was rightly sustained.

The plaintiff based his claim for commissions against the defendant Lindsay on the following written agreement between them, to wit:—

“NOGALES ARIZONA T. Aug. 16. 1899.

“This memorandum of agreement made this day and year above written.

“It is agreed and understood that the L. Lindsay is to pay to Carl C. L. Wulff (20%) twenty per cent, on any sail made through him or to pay the same percentage on any sail made through a certain bond or agreement made to Robert Hennigan of this date on certain mining properties mentioned in said agreement in Ures District State of Sonora Mexico.

“L. LINDSAY.”

The complaint alleged that the plaintiff had been instrumental in bringing about a sale of certain mines of the defendant Lindsay, situated in the state of Sonora, Mexico, in the district of Arispe, and in the Cananea Mountains. The trial court overruled the demurrer of the defendant Lindsay to the complaint on the ground that, while the contract did not refer to mines in the district of Arispe, mining property in the Cananea Mountains might be in the Ures district. The case went to trial as against the defendant Lindsay, and on the trial it appeared that the property sold was in the district of Arispe, and not in the district of Ures. The plaintiff contended that the agreement covered sales in Arispe district, and sought to introduce a former agreement between the parties and other oral testimony to show the facts surrounding the making of the agreement sued upon, and the intention of the parties in making the agreement, and the construction given by them thereto. All this evidence was excluded by the court, and, no further evidence being given, judgment was rendered for the defendants. The plaintiff duly excepted to the rulings, and now assigns error in respect thereto.

This action is not an action based upon a parol agreement. It is brought and based upon the agreement above set forth, and that must stand as the entire contract upon which a recovery can be had. Under this agreement the plaintiff was limited in his claim to commissions for the sale of property in the Ures district. There is no ambiguity in the language or the wording of the document. It is an agreement for the payment to Wulff of twenty per cent on any sale made through him, or through the bond to Hennigan, of mining

properties in the Ures district, state of Sonora, Mexico. The contention of the appellant is that the agreement is to be construed that Wulff should receive twenty per cent for any sale made by him of properties situated anywhere, or on any sale, through the Hennigan bond, of properties in the Ures district; making the Ures district apply only to the Hennigan sale, and allowing Wulff a commission if he should make a sale of mining property of the defendant, wherever situated. Such a construction requires the introduction of a full or partial stop in punctuation after the word "him," making the clause read "to pay Carl C. L. Wulff (20%) twenty per cent, on any sale made through him." Such a clause does not contain the elements of a contract. It does not even show whether the subject of the sale was mining properties, houses, or cattle. It is a forced and unnatural construction, not warranted by the plain language of the contract. As we have held in the case of *Burmister v. Empire Gold M. and M. Co.*, ante, p. 158, (decided at this term,) 71 Pac. 961, where the language of a document, or the specific words used therein, are so obscure or uncertain that the intention of the parties may not be ascertainable therefrom, the court may, in a proper case, receive such evidence as is competent, of the circumstances surrounding the adoption of the instrument, to aid the court in determining the construction to be given thereto. Where, however, as in the instrument sued upon, the language is clear, the only question is, What did the parties mean by the language they used? And this is a question for the court to determine from the instrument itself, without other evidence. The words "in Ures district state of Sonora Mexico" referred to and qualified the whole sentence, and thereby the plaintiff was limited in his recovery to sales made of properties in that district. *O'Connor v. Adams*, 6 Ariz. 404, 59 Pac. 105; *Eby's Appeal*, 70 Pa. St. 311; *Coxson v. Doland*, 2 Daly, 66; Black on Interpretation of Laws, 151. The trial court so properly construed it, and committed no error in excluding the evidence sought to be introduced by the appellant.

We find no error in the record, and the judgment is affirmed.

Sloan, J., and Doan, J., concur.

[Civil No. 817. Filed March 20, 1903.]

[71 Pac. 914.]

A. ABERNATHY, Plaintiff and Plaintiff in Error, v. THOMAS REYNOLDS, Defendant and Defendant in Error.

1. **APPEAL AND ERROR—FINDINGS—SUPPORTED BY EVIDENCE—WILL NOT BE DISTURBED—REVIEW.**—Where there is any evidence fairly tending to support the findings of the trial court as to the facts, such findings will not be disturbed by the appellate court.
2. **SAME—EVIDENCE—IMMATERIAL—TRIAL WITHOUT JURY—HARMLESS ERROR.**—It is not ground for a reversal of a judgment that a trial court, sitting without a jury, admitted evidence which was immaterial, unless it appears that the determination of the court, in some degree at least, was based on such evidence.
3. **SAME—SAME—REBUTTAL—MATTER COVERED IN EXAMINATION IN CHIEF.**—Error cannot be predicated upon the refusal of the court to receive testimony offered by plaintiff in rebuttal, where the record shows not only that no ruling was made by the court excluding any answer to any specific question, but that the whole matter was explained by plaintiff in his examination in chief.
4. **SAME—SAME—IMPEACHMENT—FAILURE TO LAY FOUNDATION.**—In an action brought to establish the title of plaintiff to a one-half interest in a certain mining claim, the wife of plaintiff testified to conversations she had heard between plaintiff and defendant. A witness for the defendant testified to a conversation which he had with plaintiff, which tended to show that plaintiff knew witness had a bond and lease on the mining claim in question, which he had obtained from the defendant, and that plaintiff made no claim to the property. Plaintiff then offered to prove by his wife that defendant's witness came to her after he had taken a bond on the claim and wanted to buy it. This was excluded. *Held*, that such testimony was only competent as tending to impeach defendant's witness, and, no foundation for such impeachment having been laid, the testimony was properly excluded.

ERROR to the District Court of the Second Judicial District in and for the County of Gila. F. M. Doan, Judge. Affirmed.

The facts are stated in the opinion.

J. S. Sniffen, for Plaintiff in Error.

No appearance for Defendant in Error.

KENT, C. J.—This suit was brought to establish the title of the plaintiff in the action, the plaintiff in error in this court, to a one-half interest in a certain mining claim, the plaintiff claiming title by virtue of an alleged agreement between the parties whereby the defendant agreed to locate two certain mining claims, including the one in question, for their joint benefit. The defendant located the claims, and took the necessary preliminary steps to acquire title to one of the claims, but abandoned the other claim, the one in question. Subsequently the defendant located, but in his own name, the second claim, and the plaintiff brought suit to establish his title to a half interest therein under such second location.

The trial court found the agreement to be that the plaintiff was to have the option of claiming a half-interest in these two claims; that the plaintiff exercised such option by claiming his interest in the other claim, and that, when the option was exercised, the agreement between the parties terminated; that, the original location having lapsed, a subsequent location by the defendant of the claim in question gave no right thereunder to the plaintiff, since at the time of such subsequent location there was no contract or obligation between the parties under which the plaintiff could claim any interest whatsoever in the property; and gave judgment for the defendant.

The first and fourth assignments of error raise the question whether the evidence supports the findings and judgment entered thereon. The rule, which we have often stated, is that this court will not disturb the findings of the trial court as to the facts if there is any evidence fairly tending to support them. An examination of the record shows that the findings of fact were fairly supported by the evidence, and the conclusions drawn therefrom by the court are correct.

The second ground of error assigned is that the court admitted incompetent and immaterial evidence in allowing testimony showing the amount of work done on the claim after its second location by the defendant. The evidence offered was not incompetent. Under the issues it would seem to have been immaterial, but it is not a ground for a reversal of a judgment that a trial court, sitting without a jury, admitted evidence that was immaterial, unless it appears that

the determination of the court, in some degree at least, was based on such evidence. Such is not the case here.

The third error assigned is that the court erred in refusing to receive certain evidence offered by the plaintiff in rebuttal. This assignment does not specify the grounds of the error complained of, but in his brief counsel claims error in the refusal of the court to allow certain testimony of the plaintiff, offered in rebuttal, regarding a certain conversation with a witness, Pennington. An examination of the record shows not only that no ruling was made by the court excluding any answer to any specific question, but that the whole conversation was fully given by the plaintiff in his examination in chief, and he was also allowed to answer all the questions put to him by his counsel in regard thereto when called in rebuttal.

Other testimony, which it is claimed the court erred in refusing to receive, was the following: The wife of the plaintiff testified as a witness for the plaintiff, and testified to conversations she had heard between the plaintiff and defendant. Only a few questions were put to her on cross-examination, and they related solely to the conversations between the plaintiff and defendant. For the defendant, a Mr. Williams was called as a witness, who was examined and cross-examined as to a conversation with the plaintiff about the mining claim in question, upon which Williams then had a bond and lease, which he had obtained from the defendant. The conversation tended to show that the plaintiff knew of such bond, but that he made no claim to the property in question. In rebuttal, the plaintiff's wife was recalled, and asked if she had ever had a conversation with Mr. Williams in regard to this mining claim. The question was excluded by the court, and the plaintiff then offered to prove by the witness that Williams came to her after he had taken a bond on the claim, and wanted to buy it. On objection, this testimony was excluded. It was not error for the court to exclude the testimony. Such testimony was not competent, unless it was competent as tending to impeach the witness Williams, but no foundation for such impeachment had been laid, and the testimony was, therefore, properly excluded.

We find no error in the record, and the judgment of the district court is therefore affirmed.

Sloan, J., and Davis, J., concur.

[Civil No. 791. Filed March 20, 1903.]

[71 Pac. 965.]

M. M. TRICKEY, Administrator of the Estate of Norman H. Chapin, Deceased, Defendant and Appellant, v. GEORGE W. CROWE, Plaintiff and Appellee.

1. BROKERS — OPTION CONTRACT — EXPIRATION — SUBSEQUENT SALE.—

Where the owner of an interest in a mine agreed to give plaintiff a certain commission for selling same, and a prospective purchaser was secured, who took an option on the interest for a certain period, the owner depositing a deed in escrow, but the owner died before the expiration of the option, and the deed, on the failure of the purchaser to make payment, was returned to his administrator, who subsequently sold the interest to the same purchaser at the same price but on different terms, the administrator was not liable to plaintiff for the commission agreed on in the contract with decedent.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Santa Cruz. George R. Davis, Judge. Reversed.

Judgment of supreme court affirmed. Opinion, 204 U. S. 228.

The facts are stated in the opinion.

Smith & Ives, and Duffy & Richardson, for Appellant.

In all cases where the principal has revoked the contract before the broker has earned his commissions, the broker's right to commissions is absolutely cut off, except where it has been found as a fact that such revocation was a mere device to defraud the broker of his right to commissions. *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441; *Beale v. Creswell*, 3 Md. 196; *Zeimer v. Antisel*, 75 Cal. 509, 17 Pac. 642; *Armstrong v. Wann*, 29 Minn. 126, 12 N. W. 345; *Satterthwaite v. Vreeland*, 46 How. Pr. 508; *Carlson v. Nathan*, 43 Ill. App. 364; *Buehler v. Wiffenbach*, 21 Misc. Rep. 30, 46 N. Y. Supp. 861; *Pryor v. Jolly*, 91 Tex. 86, 40 S. W. 959; *Antisdell v. Camfield*, 119 Mich. 229, 77 N. W. 944.

The interest arising from commissions is not such an interest as will render the authority irrevocable. *Stier v. Imperial Life Ins. Co.*, 58 Fed. 843; *Barr v. Schroeder*, 32 Cal. 609; *Chambers v. Seay*, 73 Ala. 372; *Hamilton v. Frothingham*, 59 Mich. 253, 26 N. W. 486; *Green v. Cole*, 103 Mo. 70, 15 S. W. 317; *Coffin v. Landis*, 46 Pa. St. 426.

The death of the principal put an end to the agency, the broker's authority not being coupled with an interest. *Boone v. Clarke*, 3 Cranch C. C. 389, Fed. Cas. No. 1641; *Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589; *Missouri v. Walker*, 125 U. S. 339, 8 Sup. Ct. 929, 31 L. Ed. 769; *Scruggs v. Driver*, 31 Ala. 274.

Hereford & Hazzard, for Appellee.

DOAN, J.—This was an action brought by the appellee, as plaintiff, against the appellant, as administrator of the estate of N. H. Chapin, deceased, to recover the sum of five thousand dollars as commission on a sale alleged to have been effected by the plaintiff for the deceased, Chapin, during his life, of a one-fourth interest in a mine. The facts in the case, as disclosed by the record, were as follows: Previous to March, 1899, a mine known as the "Pride of the West" was owned by three parties. A man named Olsen owned one half thereof, and Norman H. Chapin and Jerry Neville each owned a one-fourth interest therein. In March, 1899, the plaintiff, Crowe, brought this mine to the attention of one Emerson Gee and his associate, A. R. Wilfley, and visited the mine with them. Wilfley subsequently, in the latter part of March, 1899, purchased Olsen's one-half interest, and made an agreement with Chapin and Neville for the purchase of the remaining one-half interest, a deed to which remaining one-half interest was executed by Chapin and Neville and placed in escrow, the terms of the escrow agreement providing that the deed was to be delivered to Wilfley upon the payment by him of the sum of one hundred thousand dollars in cash on or before the first day of April, 1900. It was verbally agreed between Crowe on the one part and Chapin on the other, representing himself and Neville, that Crowe was to receive ten per cent of the purchase money received by them for their interest in the mine as a commission for making the sale. This verbal agreement was made and the terms of sale were arranged in

the latter part of March, 1899, and on April 1, 1899, the deed and escrow agreement were executed by Chapin and Neville, and deposited in the Consolidated National Bank of Tucson. Prior to the first day of April, 1900, Chapin and Neville both died. M. M. Trickey was appointed the administrator of Chapin's estate, and one Henry Harmon was appointed the administrator of Jerry Neville's estate. Wilfley failed to pay the money and take the property under this option, and after the expiration of the time mentioned in the escrow agreement, and in accordance with the terms thereof, the deed in escrow was returned to Trickey, the administrator of Chapin's estate. Thereafter, on the seventh day of April, 1900, upon the payment of one thousand dollars by Wilfley, the administrators of these two estates made another agreement with him, by the terms of which they agreed to execute a deed to the half interest in the said mine owned by the two estates upon the payment of the purchase price of one hundred thousand dollars in specific amounts upon the different dates therein expressed. After the lapse of this option, M. M. Trickey, as administrator of the estate of Chapin, on the nineteenth day of June, 1900, entered into another agreement, whereby he gave to Wilfley an option to purchase the one-fourth interest in the said mine owned by the estate of Chapin, and obligated himself to execute to Wilfley a deed for such interest upon the payment of five thousand dollars in cash, five thousand dollars within three months, the further sum of five thousand dollars within six months, the further sum of five thousand dollars within nine months, the further sum of five thousand dollars within twelve months, and the further sum of twenty-five thousand dollars within eighteen months, making the full sum of fifty thousand dollars, the full purchase price to be paid. In pursuance of this option A. R. Wilfley was credited with five hundred dollars of the one thousand dollars paid on the lapsed option of April 7th prior, and paid to Trickey, administrator, four thousand five hundred dollars on that date, June 19, 1900, and afterwards five thousand dollars on September 19, 1900, five thousand dollars on December 19, 1900, five thousand dollars on March 20, 1901, five thousand dollars on June 17, 1901, and twenty-five thousand dollars on December 7, 1901, as the purchase price of the

interest of said estate in the said mine, being an undivided one-fourth interest therein.

On the tenth day of November, 1900, the plaintiff, Crowe, presented to Trickey, as the administrator of Chapin's estate, his claim against the estate of said Chapin for "ten per cent of the purchase price of the Pride of the West mine, agreement for the sale of which was entered into about April 1, 1899, and which said agreement of sale was made by Chapin and Neville to A. R. Wilfley, and which sale was brought about by the said George W. Crowe, upon the agreement that he was to receive ten per cent commission upon said purchase price from said Chapin and Neville, one half of said ten per cent being \$5,000." This claim having been rejected by the administrator, George W. Crowe brought this action in the district court of Santa Cruz County on the twenty-fifth day of January, 1901. He alleged in his complaint that Norman H. Chapin died on or about the eleventh day of January, 1900, and that on the eighth day of February, 1900, the defendant, M. M. Trickey, was appointed and qualified as the administrator of Chapin's estate; that between the eighth day of February, 1898, and the eleventh day of January, 1900, the plaintiff performed services for the deceased, Chapin; that the particular nature of the said services was procuring a purchaser and bringing about the sale of the interest of said deceased, together with the interest of his co-owner, Jerry Neville, in the said mine, to such purchaser; that the purchaser so found and procured by plaintiff was A. R. Wilfley; that through the services and efforts of plaintiff the said deceased and the said Neville were enabled to sell and did sell to the said A. R. Wilfley their said interests in the said mine for the purchase price of one hundred thousand dollars, of which the share of the said deceased was fifty thousand dollars; that said services were reasonably worth the sum of five thousand dollars, and that said Chapin promised and agreed to pay to plaintiff for said services the sum of five thousand dollars, being ten per cent of said purchase price; that, as plaintiff believed, the whole of said purchase price had been paid to said Chapin or to said defendant, and that neither the said Chapin nor the said defendant had paid to plaintiff the said five thousand dollars, or any part thereof; that the claim therein set forth was,

about the tenth day of November, 1900, presented to the defendant, as administrator of Chapin's estate, and by him rejected; that the estate of Chapin was solvent.

The defendant answered by demurrer, an allegation of defect of parties, and a verified general denial.

On the trial of the case before the court without a jury, the court found as facts: "That between the 8th day of February, 1898, and the 11th day of January, 1900, the plaintiff performed services for the said Norman H. Chapin, at the request of said Chapin, in bringing about a sale of the interests of the said Chapin in the Pride of the West mine, which mine is located in the said county of Santa Cruz; that the particular nature of said services was the finding and procuring of a purchaser and bringing about a sale of the interests of the said Chapin in the said Pride of the West mine; that the purchaser so found and procured by plaintiff was A. R. Wilfley, of Denver, Colorado—for which services the said Chapin agreed to pay to the said plaintiff ten per cent of all moneys received by the said Chapin from the said Wilfley on account of the sale by the said Chapin and the purchase by the said Wilfley of the said mine. That the said A. R. Wilfley paid to the said defendant, as such administrator, for the interest of the said Chapin, the sum of fifty thousand dollars (\$50,000), as follows: April 7, 1900, \$500; June 19, 1900, \$4,500; September 19, 1900, \$5,000; December 19, 1900, \$5,000; March 20, 1901, \$5,000; June 17, 1901, \$5,000; December 7, 1901, \$25,000." Upon these facts the court rendered judgment in favor of the plaintiff for five thousand dollars, and directed the defendant to pay the said sum out of the estate of Chapin in the due course of the administration of the said estate; from which judgment and the denial of a motion for a new trial the defendant appealed.

The appellant has presented in his assignment of errors many questions that we find it unnecessary to investigate or determine. Among the undisputed facts presented by the record in this case are these: Crowe, in March, 1899, as a broker, found and presented to the owners of the mine as a purchaser A. R. Wilfley, who purchased a half interest in the mine from Olsen, and took from Chapin, who represented himself and Neville, an option on the other half interest owned by them. By the terms of this option Wilfley had

the privilege of paying one hundred thousand dollars on the first day of April, 1900, and taking the deed to the one-half interest in the mine, which was, in pursuance of the terms of said option agreement, executed by N. H. Chapin, Marie Chapin, Jerry Neville, and Refugia Neville, and was deposited in escrow to his order upon such payment. He failed to avail himself of this option, and after the expiration thereof, and after the death of both Chapin and Neville, the deed was returned to the administrator of Chapin's estate. Within seven days thereafter Wilfley entered into a written agreement, with M. M. Trickey, the administrator of Chapin's estate, and Henry Harmon, the administrator of Neville's estate, for the purchase of the property on the following terms: Ten thousand dollars cash, ten thousand dollars in three months, ten thousand dollars in six months, ten thousand dollars in nine months, ten thousand dollars in twelve months, and fifty thousand dollars in eighteen months, and paid one thousand dollars on such option. This was an independent transaction, in which no reference was made to the former option or deed deposited in pursuance thereof, but Trickey and Harmon, as administrators, agreed to execute deeds, and Wilfley and they acknowledged the instrument before a notary. Failing to pay the other nine thousand dollars of the cash payment, this option lapsed, and on June 19th Wilfley made another deal with M. M. Trickey, as the administrator of Chapin's estate, for the one-fourth interest owned by the Chapin estate, and paid four thousand five hundred dollars in cash on that date, and took from Trickey a bond obligating him, on the full payment of the remainder of the purchase price within the ensuing eighteen months, to execute a deed conveying to Wilfley the right, title, and interest of the estate of N. H. Chapin, deceased, in and to the said mining property, and described as a one-fourth interest therein. This was an independent transaction, containing no extension of, or reference to, any former agreement or deed, but Trickey bound himself upon the payment of the purchase price to execute a deed as administrator conveying the right, title, and interest of the estate. These payments were thereafter made on the times required in the title bond, and the sale perfected thereby. Crowe had nothing whatever to do with the sale of the property after the death of Chapin.

The only parties who participated in the negotiations leading up to the last contract executed by Trickey as administrator were Wilfley and Trickey. The only parties in the other instance—the contract of April 7, 1900—were Wilfley on the one side, and the administrators, Trickey and Harmon, on the other. Crowe bases his claim to commission entirely upon the agreement made with him by Chapin in March, 1899, and the subsequent purchase of the property by Wilfley from the administrator of Chapin's estate. Wilfley is the purchaser whom Crowe procured, and the same property contracted for between Chapin and Wilfley was subsequently purchased by Wilfley from the administrator of Chapin's estate at the same price agreed upon between Wilfley and Chapin, though on different terms, and in an entirely different transaction, after the option given by Chapin to Wilfley had expired. The whole question in this case is the liability of Chapin's estate to Crowe for the commission on such sale upon this state of facts.

The rule governing the liability for commission has been very plainly laid down in the decisions of our courts of last resort. These decisions in general terms hold that, in order to entitle him to commission, a broker must complete the sale of the property within the life of his contract, unless such completion is prevented through the fault of his principal, or his authority is revoked and his brokerage terminated in bad faith by his principal before the completion of such sale, for the purpose of preventing his receiving the commission that he has fairly earned. This general rule, in somewhat different language, is announced in the following citations:—

"The broker must complete the sale; that is, he must find a purchaser in a situation and ready and willing to complete the purchase on the terms agreed on, before he is entitled to his commissions." *McGavock v. Woodlief*, 20 How. 221, 15 L. Ed. 884.

"The duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made, and until this is done his right to commissions does not accrue. It must further appear that the broker performed the duty assumed by him within the time limited in his contract, or within such ex-

tension of time as may have been granted by his employer. If he fail to do that, he is not entitled to the commission, even though he made efforts to sell the property, and first called to it the attention of the party who subsequently made the purchase, unless the delay was caused by the negligence, fault, or fraud of the owner." *Zeimer v. Antisell*, 75 Cal. 509, 17 Pac. 642.

"Where the broker opens negotiations, but, failing to bring the customer to the specified terms, abandons them, and the owner subsequently sells the property to the same person at the price fixed, he is not liable to the broker for his commissions." *Wylie v. Marine National Bank*, 61 N. Y. 415.

"It is the established rule that a broker is never entitled to commissions for unsuccessful efforts. . . . The broker may devote his time and expend his money with ever so much devotion to the interests of his employer, and yet if he fails—if, without effecting an agreement or accomplishing a bargain, he abandons the effort, or his authority is fairly and in good faith terminated—he gains no right to commissions, and in such event it matters not that after his failure and the termination of his agency what he has done proves of use and benefit to the principal. He may have introduced to each other parties who otherwise would have never met. He may have created impressions which, under later and more favorable circumstances, naturally lead to, and materially assist in, the consummation of a sale. . . . But all that gives him no claim. This, however, must be taken with one important and necessary limitation. If the efforts of the broker are rendered a failure by the fault of the employer; if he changes his mind after the purchaser, ready and willing and consenting to the prescribed terms, is produced; or if the latter declines to complete the contract because of defect of title in or encumbrance on the property—then the broker does not lose his commission. One other principle applicable to such a contract needs to be kept in view: Where no time for the continuance of the contract is fixed by its terms, either party is at liberty to terminate it at will, subject only to the ordinary requirements of good faith. Usually the broker is entitled to a fair and reasonable opportunity to perform his obligation, but, that having been granted him, the right of the principal to terminate his authority is absolute and un-

restricted, except only that he may not do it in bad faith, and as a mere device to escape the payment of the broker's commission. . . . If, after the broker has been allowed a reasonable time within which to produce a buyer and effect a sale, he has failed to do so, and the seller in good faith and fairly has terminated the agency, and sought other assistance, by the aid of which a sale is consummated, it does not give the original broker a right to commissions because the purchaser is the one whom he introduced, and the final sale is aided or helped forward by his previous unsuccessful efforts." *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441.

The authority of a broker, and therefore his right to commissions on a sale made, may be terminated by the agreement of the parties, by revocation on the part of the principal, or by the operation of law. The citations above are from cases where the principal directly revoked the authority or withdrew the property from the broker. But the United States supreme court has said that "no principle is better settled than that the powers of an agent cease on the death of his principal." *Galt v. Galloway*, 4 Pet. 332, 7 L. Ed. 876. It is the general rule that the authority of an agent or broker, even when embodied in a power of attorney under such circumstances as to render it irrevocable during the life of the party granting it, becomes extinct by his death. This general rule that a power ceases with the life of the person giving it admits of but one exception: that, if the power be coupled with an interest, it survives the person giving it, and may be executed after his death. But by such interest is not meant an interest in that which is produced by the exercise of the power, but it must be an interest in the property on which the power is to operate. *Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589. This exception to the rule will not affect the consideration of the case at bar, because the authority to sell on commission is not an authority coupled with an interest. The cases are uniform in this respect.

When we apply these principles to the facts of the present case, we find that the efforts of the broker, Crowe, resulted in procuring the purchaser, Wilfley, not to purchase absolutely, but to take an option on the purchase of this property, for one hundred thousand dollars. Crowe's principals executed a deed to the property and placed it in escrow. Although

Chapin and Neville both died before the expiration of that escrow agreement, the deed executed by them remained subject to the order of the purchaser, and, if he had availed himself of the terms of that agreement, the sale would have been completed, and the broker would have been entitled to his commission; but the failure of Wilfley to make the payment and take up the deed, and the return of the deed, after the expiration of the option and after Chapin's death, to the administrator of his estate, closed this transaction without any sale having been made, and therefore without any right to commissions having been acquired by Crowe. The sale that was subsequently effected was the result of the negotiations between Trickey, the administrator of Chapin's estate, and Wilfley. Crowe's power or authority to act in this manner had, before the date of his transaction, been terminated, and his agency revoked, by the death of Chapin, and he could have no further right or interest therein by virtue of the agreement of March, 1899, between him and Chapin.

There is no claim on his part that he was consulted by either the vendor or vendee in the later negotiations. He rendered no service to Trickey, received no appointment or agreement from Trickey in reference to the matter, and the fact that his former efforts to effect the sale, while he failed in its completion, might have tended to assist Trickey in perfecting it, or might have to a very great extent rendered possible the consummation of such sale, will not suffice to establish a claim on his part against the estate of Chapin for commission on a sale that Trickey accomplished without his service.

The court erred in finding that Crowe, "between the 8th day of February, 1898, and the 11th day of January, 1900, brought about a sale of Chapin's interest in the mine," the undisputed evidence in the case being that this sale was never perfected, but that after the expiration of the option the deed executed by Chapin was returned to the administrator of his estate, and the property was thereafter purchased by Wilfley through the medium of an independent transaction with the administrator, in which negotiations Crowe took no part, rendered no service, and had no interest.

The court likewise erred in finding: "That the said A. R. Wilfley paid to the said defendant, as such administrator,

for the interest of the said Chapin, the sum of fifty thousand dollars (\$50,000), as follows: April 7, 1900, \$500; June 19, 1900, \$4,500; September 19, 1900, \$5,000; December 19, 1900, \$5,000; March 20, 1901, \$5,000; June 17, 1901, \$5,000; December 7, 1901, \$25,000"—because there is no evidence to sustain such finding, but the undisputed evidence in the record proves the contrary. If Wilfley had paid the purchase price under the option given by Chapin, and had taken up the deed deposited by Chapin and Neville, the evidence thereof would have sustained this finding; but the plaintiff himself put in evidence the testimony of Wilfley and the purchase agreement made between Wilfley and the administrators, Trickey and Harmon, on April 7, 1900, and also the contract of sale and title bond executed by Trickey, as administrator, on June 19, 1900; none of which evidence is contradicted, and all of which established conclusively the fact that Wilfley paid the fifty thousand dollars mentioned in the finding on the dates as given therein to the defendant, Trickey, not for the interest of the said Chapin, as would have been the case had Wilfley paid it for the Chapin and Neville deed, but for the "right, title, and interest of the said estate of Norman H. Chapin, deceased, in and to" the said property, and in compliance with the terms of the contract of sale and title bond executed to him by Trickey, the administrator of said estate, on June 19, 1900.

The judgment of the lower court is reversed, the case is remanded, and judgment is directed to be entered in the lower court for the defendant.

Kent, C. J., and Sloan, J., concur.

[Civil No. 816. Filed March 20, 1903.]

[71 Pac. 954.]

UNITED STATES OF AMERICA, Plaintiff and Appellant,
v. UNITED VERDE COPPER COMPANY, a Corpora-
tion, Defendant and Appellee.

1. PUBLIC LANDS—TIMBER—REMOVAL—MINING PURPOSES—INTERIOR DE-
PARTMENT—RULES AND REGULATIONS—SCOPE—ACT OF CONGRESS,

JUNE 3, 1878, 20 STATS. 88, 1 SUPP. REV. STATS. U. S. 166, (U. S. COMP. STATS. 1901, p. 1528,) CONSTRUED.—Congress, by act *supra*, having provided for the taking of timber from public mineral lands for mining purposes, subject to such regulations as the secretary of the interior may prescribe; *held*, that the secretary may prescribe rules and regulations concerning the removal of timber, and while his interpretation of the intent of the act is entitled to weight, yet he has no power to enlarge or restrict the purposes for which timber may be used.

2. SAME—SAME—SAME—SAME—ROASTING ORES—SMELTING.—The taking of timber from public mineral lands for the purpose of “roasting” ores at the mine, by which “roasting” the ores are not fused, but the volatile substances are driven off in vapor, gases, etc., and the ores more readily and economically smelted thereafter, is a taking for “mining purposes” within the purview of statute, *supra*.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. Richard E. Sloan, Judge. Affirmed.

Affirmed. Opinion, 196 U. S. 207, 49 L. Ed. 449.

The facts are stated in the opinion.

Frederick S. Nave, United States Attorney, and John H. Campbell, Assistant United States Attorney, for Appellant.

By general regulations, Congress has not only not granted a license or privilege for the cutting of timber on the public lands, but has, on the contrary, expressly served notice that no such cutting is permitted. Rev. Stats. U. S. 2461; *Northern Pacific Ry. Co. v. Lewis*, 162 U. S. 376, 16 Sup. Ct. 831, 40 L. Ed. 1006.

Any person who asserts the right to cut timber must be prepared to show an express privilege, and to show that his cutting has been in compliance with all the conditions of the privilege. *Northern Pacific Ry. Co. v. Lewis*, 162 U. S. 376, 16 Sup. Ct. 831, 40 L. Ed. 1006.

John J. Hawkins, for Appellee.

The use of the wood for the purpose of roasting ore was strictly in accordance with the act of June 3, 1878. *United States v. Richmond Min. Co.*, 40 Fed. 415.

DOAN, J.—The complaint in this action, brought by the United States against the United Verde Copper Company, a corporation, alleges that one Rafael Lopez, a citizen of the United States, and a *bona fide* resident of the territory of Arizona, between the fifteenth day of February, 1900, and the seventeenth day of April, 1901, wrongfully cut and removed from the unsurveyed public mineral lands of the United States a large amount of timber, the property of the United States, and sold the same to the defendant, and that the defendant used the timber for the purpose of roasting ore at its mines situated in the territory, in violation of act of Congress of June 3, 1878, (20 Stats. 88, 1 Supp. Rev. Stats. 166 [U. S. Comp. Stats. 1901, p. 1528],) and of the rules and regulations of the secretary of the interior promulgated under the authority of the act. A general demurrer was interposed to the complaint, and a special demurrer on the ground that the complaint alleged that the timber was used by the defendant "for the purpose of roasting ore, which the defendant had a right to do under the act," such use being "licensed and permitted by the act." The demurrer was sustained, and judgment entered thereon for the defendant.

The legal right of the United States to recover the value of the timber from the one who unlawfully cuts it, or from any purchaser of such timber, is well established. *Wooden Ware Co. v. United States*, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230; *Northern Pacific R. R. Co. v. Lewis*, 162 U. S. 376, 16 Sup. Ct. 831, 40 L. Ed. 1002. The absolute ownership of these lands being in the United States, no one had the right to enter upon the lands, or cut timber therefrom, without its consent. The government chose to make some exceptions in favor of certain classes of people, to whom were given the right to cut timber for certain purposes. The broad general rule being against the right, and the right to cut being exceptional, for specified purposes only, such right, if acquired by the defendant by reason of a compliance with the provision of the statute, should have been shown by it. In the absence of evidence establishing such right, the presumption is that the cutting is illegal, and, as a matter of practice, a complaint simply alleging the cutting would state a cause of action; but in this instance the complaint has gone farther,

and has alleged the purposes for which, and the conditions under which, the cutting was done, thus relieving the defendant from the necessity of such showing, and has clearly presented for the consideration of the court the question whether or not timber cut from the public mineral domain may, under the terms of the act, be used for roasting ore. If such use is within the terms of the act, then the demurrer to the complaint was properly sustained. If such use is not within the terms of the act, then the complaint states a good cause of action against the defendant.

The act in question, omitting the parts not material, is as follows: "All citizens of the United States and other persons, *bona fide* residents of the . . . territories of . . . Arizona, . . . shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said states, territories, or districts of which such citizens or persons may be at the time *bona fide* residents, subject to such rules and regulations as the secretary of the interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes." Act June 3, 1878, 20 Stats. 88, 1 Supp. Rev. Stats. 166 [U. S. Comp. Stats. 1901, p. 1528].

Under this act the secretary of the interior, on January 18, 1900, promulgated certain rules and regulations governing the felling and removing of timber from the public domain for mining and domestic purposes; such rules, so far as material, being as follows:—

"(4) The uses for which the timber may be felled or removed are limited by the wording of the act to 'building, agricultural, mining, or other domestic purposes.'

"(5) No timber is permitted to be felled or removed for purposes of sale or traffic, or to manufacture the same into lumber or other timber product as an article of merchandise, or for any other use whatsoever, except as defined in section 4 of these rules and regulations."

"(7) No timber is permitted to be used for smelting purposes, smelting being a separate and distinct industry from that of mining."

“(10) These rules and regulations shall take effect February 15, 1900, and all existing rules and regulations heretofore prescribed under said act by this department are hereby rescinded.”

It will be observed that by section 7 of these rules the secretary of the interior decides that the use of timber for smelting purposes is not permitted under the license given by the above act, for the reason that smelting is a separate and distinct industry from that of mining. Under these rules this action was brought on the theory that the use of the timber for roasting ore was a use for smelting purposes, and hence prohibited.

The power and authority of the secretary of the interior to make such rules as may be proper with respect to the cutting and removal of timber under the act has been upheld by the courts. *Northern Pacific R. R. Co. v. Lewis*, 162 U. S. 376, 16 Sup. Ct. 831, 40 L. Ed. 1002; *United States v. Williams*, 6 Mont. 379, 12 Pac. 851. While the act directly clothes the secretary with the power to prescribe rules and regulations concerning the cutting and removal of timber, and his interpretation of the intent and true meaning of the act would be entitled to great weight, it will not be contended that the secretary, by any rule or regulation, has the power to enlarge or restrict the purposes expressed in the act for which such timber may be used; so that if, by the act itself, Congress has given the right to use such timber for roasting ore, any rule promulgated by the secretary that would prohibit such use would be unauthorized and illegal. We have, therefore, to consider whether such use is authorized by the act itself. The act allows such use for building, agricultural, mining, and other domestic purposes. It is apparent, therefore, that if the use of timber for roasting ore is entitled to be classed as a use for “mining purposes,” such use is within the terms of the act.

We think it was the intent of Congress by this act to encourage and develop the industry of mining, and in so doing to enable miners to make free use of the timber on the mineral lands in the development of their mines, and for all purposes that may be classed under the head of mining; and that they were not restricted in such use to the employment of timber in the mine itself, but its application and use was intended

to be granted in the many ways requisite and necessary for the proper development of the industry. While it was intended that those engaged in mining, whether individuals or incorporated companies, should have the privilege to cut and use timber necessary for the development of their mines, and for purposes directly connected therewith, it was not the intention of Congress that plants erected for the independent business of smelting ores, commonly known as "custom smelters," should be allowed to make use of such timber in such enterprises, for the reason, as given by the secretary of the interior, that such business is "a separate and distinct industry from that of mining." In the only case which we have found in which this question is discussed (*United States v. Richmond Mining Co.*, 40 Fed. 415) the United States circuit court for Nevada held that the use of wood and charcoal in the reduction of ores and refining the product thereof by mill or furnace process, if not strictly a mining use, was certainly a use incident to mining, and closely connected with it. Those engaged in reducing ores within the state were therein held to be within the benefits conferred by the above statute, and entitled to use wood or timber cut from government mineral lands for that purpose. The court in that case decided that the defendant company, a corporation, had full right to purchase wood cut from public mineral lands, and charcoal made from such wood, and use the same at its reduction works, and that the statute above cited was a complete defense to the action brought by the government against it therefor. This case was taken on writ of error to the United States supreme court, but was there dismissed on motion of the plaintiff in error without a review of the same, thus leaving the decision above cited the only authority we have on this question. This case was tried, however, prior to the adoption and promulgation of the rule above quoted.

We believe that the defendant in this instance was fully protected by the statute in using the wood sued for, under the license granted in the act to use wood for mining purposes, unless the roasting of ores should properly be classed as a part of the process of smelting, and is, for that reason, not included in the general classification of mining purposes. The complaint alleges that this wood was used by the defendant for the purpose of roasting ore at its mines in Yavapai

County, Arizona. It is a matter of common knowledge that in this territory the roasting of ores at the mines from which it is taken is ordinarily accomplished by piling the ore and the wood mingled with it in piles in the open air, and by igniting the wood the fire is communicated to the sulphurous or other combustible ingredients in the ore, and thus, by the heat generated by its own combustion and that of the wood mingled with it, the volatile substances are driven off in vapor, smoke, and gases from the ore thus treated. By this treatment the ores that are extremely sulphide or highly charged with other volatile substances are relieved from a large portion thereof, and are the more readily treated by smelting or other processes of reduction, and besides require less fluxing material for such reduction, and are also lighter in weight, and for that reason, when shipped to other points for smelting or further treatment of any kind, cost less for freight. Construing the pleading strictly against the pleader, as it is our duty to do, we must assume that the wood was not used in a custom smelter, but was used by the defendant for roasting ore obtained from its mines in the ordinary manner above described.

It is urged by the counsel for the appellant that: "Both as a matter of common knowledge and as a matter of definition of the words, 'roasting ore' is a part of the process of smelting, and the use of wood for the purpose of roasting ore as set forth in the complaint is using it for smelting purposes. Therefore, the allegation of the complaint being that the timber was used by the appellee for roasting ore, it states a proper cause of action, and is not obnoxious to demurrer." In support of this proposition he quotes the definition from the Standard Dictionary of the verbs "smelt" and "roast," as follows: "Smelt: To obtain (a metal) from the ore by a process that includes fusion; also in a more limited sense to reduce ores, sweepings, metallurgical products, etc., by fusion in a furnace." "Roast: [The only definition applicable in the discussion]: (4) Metal. To heat highly (metallic ores) with access of air, but without fusing, for the purpose of driving off or volatilizing impurities, or for oxidizing them." We think that from the authority herein cited by himself, the counsel has proven the reverse of the proposition, and that, without looking farther than the definition above, it is shown

that smelting, even in its more general sense, is the obtaining of metal from the ore by a process that includes fusion, while roasting ore is to heat highly with access of air, but without fusing; thereby distinguishing the roasting of ore from smelting, rather than including it therein. But upon looking farther we find that the definitions given by Webster are: "Smelt. 1. To melt or fuse, as ore, for the purpose of separating the metal from extraneous substances." "Roast: 5. To dissipate by heat the volatile parts of, as ores." The definitions given by Worcester are: "Smelt: 1. To melt or fuse, as ore, for the purpose of separating metal from extraneous substances." "Roast: 5. To expel volatile matters from by exposing to heat, as ores." These are the general definitions as given in the dictionaries recognized as authority by the courts and by our people generally. But in the case of *Lourey v. Cowles Electric Smelting and Aluminum Co.*, 68 Fed. 354, Judge Taft, of the United States circuit court, has quoted in his decision some very full and satisfactory definitions of these terms that will be of interest in this determination. "'Smelting,' by its derivation, is synonymous with 'melting,' but in metallurgy and the commercial manufacture it has come to have a more contracted meaning. Thus Prof. Morton, the expert for the defendant, quotes, from a treatise on metallurgy by Frederick Overman, this distinction between 'melting' and 'smelting': 'When metallic ores are exposed to heat, and such reagents as develop the metal, we call it "smelting," in contradistinction from the mere application of heat, causing the ore to become fluid, which is called "melting."' Prof. Morton, however, is of the opinion that 'smelting' really means nothing more than 'melting apart,' and that any process in which the melting apart or separation of a metal from its ores is effected by the use of electricity is correctly described as electric smelting. . . . Prof. Langley, the expert for the complainant, thus defines 'smelt': 'The word "smelt" is customarily applied to that class of metallurgical operations in which a metal results, said metal being in a metallic condition, and obtained from an ore or mixture in which the metal originally existed in the form of a chemical compound. In all instances the operation of smelting results in producing something different from the body operated upon, and this change is brought about by the action of heat

and chemical force. . . . "Smelting," then, may be said generally to indicate the melting of something by heat, accompanied by a chemical change induced by the substances present in contact with the ore. . . . The substance added to bring about a chemical change in the earthy matters of the ore are called "fluxes," and they generally consist of limestone, or of limestone and clay, so that, in the practical sense of the word, one may say the term "smelting" always involves melting by heat and the concomitant presence of a chemical change.' "

These definitions of the term "smelt," taken in connection with the fact that smelting is ordinarily accomplished by means of extensive plants erected for that purpose, and very often at great distances from the mines producing the ores smelted, while only the most extremely sulphide ores are roasted, and the roasting, when done, is frequently accomplished in a primitive manner by the combustion in the open air of the sulphur, arsenic, and more volatile portions of the ore, and in all cases, whether in the primitive manner mentioned or in reverberatory furnaces, is accomplished without any fusion or melting of the metal contained in the ore, satisfy us that the process of roasting ores, instead of being included in, is entirely different and distinct from, smelting, and the use of wood therefor is properly included among the uses authorized by the statute for "mining purposes."

Where a company extracts the ores from its mines, carries that part needing such treatment to the roasting dump, uses wood in roasting therefrom the sulphur, arsenic, and other volatile substances, and then runs the ore through its reduction plant and converts the same into a merchantable product, the extraction of the ore from the mines, the roasting it upon the dumps preparatory for its final reduction in the furnaces and other reduction plants established for that purpose, is clearly a part of mining, and the whole process of such extraction and preparation, taken together, is within the protection of the statute.

We feel that in the consideration of this subject the practical, usual, and ordinary meaning of the words "mining" and "mining purposes," etc., should govern, rather than any narrow meaning that might be argued out from the definitions given by the lexicographers. The roasting of the more sul-

phurous of the ore taken from the mine, on the dump near such mine, in order to prepare it for the operation of smelting, is as much a part of mining as the separation of the ore from the rock inclosing or surrounding it by the laborers, or the handling of such ore by machinery after having been taken from "in place." They are all steps toward taking the mineral from the elements originally mixed with it and surrounding it, and preparing it for the purposes of reduction to metal in merchantable shape. They are not a part of, or connected with, smelting, or any treatment of the ore during its reduction in the smelter. We feel that it was the intention of Congress in passing this act that it should be so construed, in order that through the license therein granted the building up of the vast mineral resources of the nation might be accomplished, and the nation at large benefited, as well as the citizens of the mining regions; and the history of mining since the passage of this act has shown the wisdom of Congress in enacting the law.

The demurrer to the complaint was properly sustained. The judgment of the lower court is therefore affirmed.

Kent, C. J., and Davis, J., concur.

[Civil No. 815. Filed March 20, 1903.]

[71 Pac. 926.]

CHARLES B. MCLEAN et al., Defendants and Plaintiffs in Error, v. TERRITORY OF ARIZONA, by ARTHUR J. EDWARDS, District Attorney of Maricopa County, on the complaint of H. F. SECRIST et al., Plaintiff and Defendant in Error.

1. APPEAL AND ERROR—JUDGMENT—DEFAULT—REV. STATS. ARIZ. 1901, PAR. 1473, CONSTRUED.—Paragraph 1493, *supra*, providing that "an appeal or writ of error may be taken to the supreme court from any final judgment of the district court, rendered in civil cases . . . which the supreme court has jurisdiction to review," does not authorize an appeal or writ of error by a defendant against whom there has been entered a judgment by default.

2. ~~SAME—SAME—SAME—PROCESS—SERVICE BY PUBLICATION—MOTION—~~
TO SET ASIDE—FOR NEW TRIAL—JURISDICTION—REV. STATS. ARIZ.
1901, PARS. 1342, 1480, CITED.—Paragraph 1342, *supra*, provides
that “Where any defendant shall appear specially in any court in
this territory for the sole and only purpose of objecting to the juris-
diction of the court, whether said objection be sustained or denied,
such appearance shall not be held to be a general appearance or
to give the court jurisdiction.” Paragraph 1480, *supra*, provides
that “In cases in which judgment has been rendered on service
by publication, where the defendant has not appeared in person
or by an attorney of his own selection, a new trial may be granted
by the court, upon the application of the defendant, for good
cause shown, supported by affidavit filed within one year after
rendition of such judgment.” Where judgment by default has
been rendered on service of process by publication, defendants not
having appeared, their remedy is to appear specially under para-
graph 1342, *supra*, or to move for a new trial as provided in
paragraph 1480, *supra*, and not by writ of error, the supreme court
having no jurisdiction in such case.

ERROR to the District Court of the Third Judicial District
in and for the County of Maricopa. Edward Kent, Judge.
Dismissed.

Appeal to United States supreme court perfected. No
mandate filed.

The facts are stated in the opinion.

C. F. Ainsworth, for Plaintiffs in Error.

J. H. Kibbey, A. C. Baker, and Walter Bennett, for De-
fendant in Error.

DOAN, J.—An action was brought on July 15, 1902, in the
district court of Maricopa County by A. J. Edwards, district
attorney, upon the complaint of H. F. Secrist et al., as
plaintiffs, in the nature of *quo warranto* proceedings against
C. B. McLean et al., defendants, for the purpose of inquiring
into the right of the said defendants to exercise the duties
and privileges of members of the board of directors of the
Keystone Copper and Gold Mining Company, a corporation,
wherein the plaintiffs prayed the judgment of the court that
the plaintiffs are the legally elected and qualified directors
of the said company; that the defendants are not the legally

elected and qualified directors thereof, and that the defendants surrender and deliver to the plaintiffs the books, papers, files, and property of the corporation; and that the plaintiffs have judgment for their costs. The defendants were all residents of Pittsburg, Pennsylvania. Service of summons by publication was had upon them and copies of the summons and complaint were mailed to them severally at that address. Upon the failure of the defendants to file an answer, their default was on September 9, 1902, duly entered against them; and upon the trial of the case on September 10, 1902, upon motion of the plaintiffs, judgment by default was entered against the defendants, wherein it was adjudged by the court that "the said defendants are in default, and that the matters and things alleged against them, and each of them, in the said complaint, are taken to be by them confessed as true. Wherefore it is adjudged by the court that the said defendants are each and all guilty of the unlawful intrusion into the office of members of the board of directors of the Keystone Copper and Gold Mining Company, a corporation organized under the laws of the territory of Arizona, and of usurping the same, and of excluding the above-named complainants therefrom. And it is further adjudged and decreed by the court that the said complainants . . . were . . . and are now the lawfully elected board of directors of the said . . . corporation, . . . and entitled to the exercise of the rights and privileges and to the discharge of the duties thereof, and the said defendants are, and each of them is, enjoined from interfering with the said complainants, or any of them, therein."

Thereafter, on November 19, 1902, the defendants sued out a writ of error removing the judgment rendered as aforesaid to this court for revision and correction, and afterwards, on December 9, 1902, filed in the lower court an assignment of error as follows:

"(1) The court erred in rendering judgment against the plaintiffs in error without first having obtained any jurisdiction whatever over either the person of the said plaintiffs in error or of the subject-matter of the action.

"(2) The court erred in rendering judgment against the plaintiffs in error without having first filed a statement of the evidence produced upon the trial of this cause, which should have been signed and approved by the judge, and made a part of the record hereof.

"(3) The court erred in rendering judgment against the plaintiffs in error on the pleadings, without first having heard and taken evidence to sustain the allegations in such pleadings.

"(4) The court erred in rendering judgment against the plaintiffs in error, in that said judgment was rendered and after the default of the plaintiffs in error was entered."

It seems to us that there are two reasons that preclude our reviewing this case; the one being that it calls for a review of a judgment by default without any motion having been made in the lower court to open the default and grant a new trial, wherein the court of original jurisdiction might have an opportunity to correct any errors that it might have committed, and the other reason being that if the lower court had no jurisdiction over the person of the defendants or the subject-matter of the action, as alleged, its judgment was absolutely void, and the proper procedure by the plaintiffs in error was by motion in the lower court rather than by review in this—the appellate—court.

The first error assigned would have been proper ground on which to base a motion to annul and vacate the judgment and dismiss the case, while the last three errors assigned would each have been proper ground upon which to base a motion for a new trial; and we seriously question the right of the plaintiffs in error to come into an appellate court to have an action of the lower court reviewed, without having ever presented these questions to the court of original jurisdiction for its action thereon. It is urged that our statute of 1901 provides, in paragraph 1493, that "an appeal or writ of error may be taken to the supreme court from any final judgment of the district court rendered in civil cases, and from any of the orders mentioned in section 1214, which the supreme court has jurisdiction to review." But under the New York statute relative to appeals, very similar to ours (section 348 of their code providing for an appeal "in all cases"), the court of appeals of that state, in *Flake v. Van Wagenen*, 54 N. Y. 25, said: "The sole question for our determination is whether the general term erred in dismissing the appeal on the ground that the judgment by default was not appealable. That it did not err is quite clear. The general term is an appellate tribunal clothed with power to review the errors of inferior tribunals and of the supreme court at the circuit or special

term. As well said by the chancellor in *Gelston v. Hoyt*, 13 Johns. 561: 'The very theory and constitution of a court of appellate jurisdiction only is the correction of errors which a court below may have committed; and a court below cannot be said to have committed an error when their judgment was never called into exercise, and the point of law was never taken into consideration, but was abandoned by the acquiescence or default of the party who raised it.' . . . The remedy of a party in such case is to apply to the court to have the default opened, or to have the order or judgment set aside, and he can thus obtain all the relief he ought to have. . . . The defendant claims, however, that since the amendment of section 348 of the code, in 1851, providing for an appeal to the general term from a judgment entered upon the direction of a single judge 'in all cases,' an appeal from a judgment entered by default may be taken. This provision has reference to cases tried and decided by single judges after hearing the parties, and where judgment has been directed after examining the issues of law or fact. The section must have some such limitation. A party certainly could not appeal from a judgment to which he had expressly assented, although entered under the direction of a single judge; and no more can he from a judgment to which he has impliedly assented by his default." The later decisions collated from states having statutes similar on this point to ours and to that of New York all sustain the doctrine enunciated in the decision quoted.

This brings us to the consideration of the second proposition—that if the lower court had no jurisdiction over the person of the defendants or the subject-matter of the action, as alleged, its judgment was absolutely void, and the proper procedure by the plaintiffs in error was by motion in the lower court, rather than by review in this—the appellate—court. "The decided preponderance of authority justifies, or, rather, requires, the court, on motion being made to vacate its judgment because it was without jurisdiction over the person or the subject-matter, to inquire whether such was the fact, and, if so, to grant the relief sought." Freeman on Judgments, sec. 98. This seems to imply that the moving party can come into court for the first time after judgment has been rendered, for this purpose, and be heard by the trial court on this subject. This statement of the law is supported by all the

cases we have examined in which the relief was sought, as in this case, by writ of error or appeal. In *In re Martin*, 62 Kan. 638, 64 Pac. 43, the supreme court of Kansas said: "We are fully convinced that the district court acted without jurisdiction of the subject-matter, and that its judgment is void. If that court was without power to hear and determine the cause, it follows that this court cannot do so upon proceedings in error"; citing *Robertson v. State*, 109 Ind. 79, 10 N. E. 582. "The proceedings in error will be dismissed. All the justices concurring." In proceedings in error in equity cases to have judgments void for want of jurisdiction canceled, and execution thereon enjoined, the relief has been invariably denied upon the same ground—that the proper course would be by motion in the court of original jurisdiction. The cases cited in *Hockaday v. Jones*, 8 Okla. 156, 56 Pac. 1054, will be of interest on this subject: "Service in this case was by publication, but the defendant was a resident, and not concealed. Therefore the publication was inoperative to bring the defendant into court, and the judgment void for want of jurisdiction of the person. . . . *Insurance Co. v. Robbins*, 53 Neb. 44, 73 N. W. 269; Freeman on Judgments, 4th ed., sec. 117; 1 Black on Judgments, sec. 218. . . . Mr. Black, in the section of his work above cited, says: 'It is a familiar and universal rule that a judgment rendered by a court having no jurisdiction of either the parties or the subject-matter is void, and a mere nullity, and will be so held and treated whenever and wherever, and for whatever purpose, it is sought to be used or relied on as a valid judgment.' . . . In *Railway Co. v. Reynolds*, *supra*, [89 Mo. 146, 1 S. W. 208], the supreme court of Missouri says: 'If the justice of the peace had acquired no jurisdiction, as the petition alleges, the railway company has no need to come to a court of equity to enjoin proceedings which are void *ab initio*. If the judgment of the justice is void, then will the execution issued thereon be void, also, and equity will not interfere to do a nugatory act.' . . . In *Insurance Co. v. Robbins*, 53 Neb. 44, 73 N. W. 272, the supreme court of Nebraska says: 'A party against whom a judgment has been rendered by default, which judgment is void for want of jurisdiction over the person of the defendant, is not entitled to an injunction to restrain the enforcement of said judgment unless it appears, both from his pleadings and proof (1) that

he had a meritorious defense to the cause of action on which the judgment is based. . . . In *Railway Co. v. Wright*, [Tex. Civ. App.], 29 S. W. 1134, it is said: 'The better rule, however, and the one most usually applied, is that equity will not grant its extraordinary power to redress a grievance where an adequate remedy exists at law for the protection of the judgment debtor against a void judgment.' On the contrary, it appears, as matter of law, that he had a clear legal remedy, more speedy and adequate than the proceedings adopted. Section 586 of the Code of Civil Procedure, [Stats. 1893, p. 860], provides: 'The district court shall have power to vacate or modify its own judgments or orders at or after the term at which such judgment or order was made. . . . (3) For mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order.' While we think that the provisions of the code relating to vacating and modifying judgments do, in their general scope and purpose, apply to proceedings that are irregular and voidable, yet we think that a judgment absolutely void may be set aside, upon motion under the third subdivision of section 586, as having been irregularly obtained. . . . Irregularity may consist in an omission or departure from the principles of 'due process of law,' as well as in procedure. In *Bankers' Life Ins. Co. v. Robbins*, 53 Neb. 44, 73 N. W. 269, the supreme court of Nebraska, in a case identical in almost every question with the one we are considering, on this point says: 'While we think that the provisions of said section of the code specially apply to voidable judgments, we do not doubt that one against whom a judgment has been rendered which is void for want of jurisdiction may have such judgment set aside, under the third subdivision of said section of the code, as having been irregularly obtained.' If the judgment against Jones was absolutely void, a proceeding in equity to annul it would be nugatory; for there is nothing to annul, and there is no wrong against him to redress or relieve from. . . . Therefore no cause of action exists to him."

Where such course has been pursued in the lower courts the practice has invariably been sustained when reviewed by the appellate courts. In the case of *Waller v. Weston*, 125 Cal. 201, 57 Pac. 892, the lower court was reversed for denying a motion to vacate such a judgment. Weston was defend-

ant in an action to foreclose a mortgage. Upon his failure to answer, judgment was taken against him, and a decree of foreclosure entered. Weston moved to set aside the default and judgment, and quash the service of summons, upon the ground that service of summons had never been made upon him, and that the court had never obtained jurisdiction over him. After hearing, the court made a conditional order vacating the judgment. The defendant refused to comply with the terms of the order imposing costs as a condition to the vacation of the judgment. After such refusal the court entered and filed a judgment by which the motion was denied absolutely. Defendant's motion to strike from the files such ruling was also denied. He then appealed from these orders. The supreme court of California, in reversing the order of the lower court denying the motion to vacate the judgment, says: "Appellant's motion was made, not upon the ground that the judgment had been taken against him through mistake, surprise, or his excusable neglect. . . . He was not seeking to be permitted, upon terms, to come in and answer. He was before the court, insisting that it had never obtained jurisdiction over him, and that a judgment against him, void for want of jurisdiction, should be set aside. His case is like those considered in *Norton v. Atchison etc. R. R. Co.*, 97 Cal. 388, 30 Pac. 585, 33 Am. St. Rep. 198, and 32 Pac. 452, and *Mott Ironworks v. West Coast P. S. Co.*, 113 Cal. 341, 45 Pac. 683. Under these circumstances, it was not within the power of the court to impose terms upon him as a condition to granting him an absolute right. For the right was absolute, if the application for relief was timely presented. The motion was made within six months after the entry of judgment, and this is sufficient. . . . The foregoing renders unnecessary any especial consideration of the second order, wherein the rule was made absolute upon appellant's refusal to comply with the terms. As it was error for the court to impose terms, the later order must fall with that determination. . . . The orders appealed from are reversed."

The record in the case at bar brings it within the law as declared in the cases above cited. This was a judgment by default, rendered on service of process by publication, where the defendants did not appear in person or by attorney.

Our statute (paragraph 1342) provides: "Where any defendant shall appear specially in any cause in any court in this territory for the sole and only purpose of objecting to the jurisdiction of the court whether said objection be sustained or denied, such appearance shall not be held to be a general appearance or to give the court jurisdiction."

Paragraph 1480 provides: "In cases in which judgment has been rendered on service of process by publication, where the defendant has not appeared in person or by an attorney of his own selection, a new trial may be granted by the court, upon the application of the defendant, for good cause shown, supported by affidavit filed within one year after rendition of such judgment."

Under the provisions of paragraph 1342 the defendants might have appeared in the lower court, at the time they sued out their writ of error, for the special purpose of objecting to the jurisdiction of the court, and might have moved the vacating of the judgment on that ground, or they could, and can yet, at any time within one year from the date of the judgment, move, under paragraph 1480, for a new trial for the correction of this or the other errors assigned herein.

In accordance with what we consider the correct declaration of the law in such cases, that, so long as a party has a right to apply to the court of original jurisdiction for the correction of errors, he cannot invoke the powers of an appellate tribunal for that purpose (*Beach v. Mosgrove* (C. C.) 16 Fed. 305), we shall leave the plaintiffs in error to their remedy in the lower court.

The proceedings in error will be dismissed.

Sloan, J., and Davis, J., concur.

[Civil No. 793. Filed March 20, 1903.]

[71 Pac. 951.]

LEWIS WOLFLEY, Defendant and Appellant, v. MOSES
HUGHES, Plaintiff and Appellee.

1. MECHANICS' LIENS—PLEADING—COMPLAINT—EVIDENCE—VARIANCE.—

In an action to enforce a mechanic's lien for castings made and furnished, the complaint stated that they were furnished upon the

verbal request of defendant, who verbally agreed to pay a certain sum therefor. The notice stated that the materials were furnished at the "specified price of \$125.22, at the special instance and request of L. and P. and the said materials were worth the" said sum. The evidence established that the materials were furnished at a certain price upon the request of defendant; that a bill was presented therefor, the items of which were taken from plaintiff's order book. *Held*, that there was no variance between the complaint and notice and the evidence adduced in support thereof, on the theory that the complaint and notice of lien alleged a verbal contract, whereas the testimony showed that the defendants had simply ordered the material without agreeing upon any specified price, and the plaintiff had charged the reasonable value thereof after completion.

2. **SAME—LIENABLE AND NON-LIENABLE ITEMS—ENFORCEMENT.**—Where, in an action to enforce a mechanic's lien, it appears that some of the articles were furnished more than ninety days before the filing of the lien, the lien will nevertheless be enforced as to articles furnished within the statutory period, where no fraud or bad faith is shown on the part of the plaintiff and he was justified in believing himself entitled to a lien for the item excluded by the court.
3. **SAME—SAME—EVIDENCE—SEGREGATION.**—In an action to enforce a mechanic's lien for materials furnished, all the items of which were of such a character that the property would be liable therefor if the lien on behalf thereof had been filed within the proper time, evidence is properly received to segregate the lienable from the non-lienable items, some of the articles having been furnished more than ninety days prior to the filing of the notice.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Edward Kent, Judge. Affirmed.

The facts are stated in the opinion.

J. B. Woodward, for Appellant.

The court erred in not sustaining demurrer of appellant, Wolfley, for the reason that the lien is claimed under "a verbal contract" and at "a specified price of \$125.22," whereas the complaint is for material "of the value of \$125.22," for which defendants verbally agree to pay "on demand the said sum of \$125.22." *Malone v. Big Flat Gravel Co.*, 76 Cal. 578, 18 Pac. 773; *Frazer v. Barlow*, 63 Cal. 71.

The lien was filed May 9, 1901, and the items charged of January 14, 1901, were barred as being more than ninety days before the filing of the lien, there having been no contract or continuity of orders, and the court so found. The lien blends in one amount the lienable and the non-lienable articles, and furnishes no evidence in itself by which the one can be separated from the other. It is void. *Davis v. Alvord*, 94 U. S. 548, 24 L. Ed. 284.

Where lienable and non-lienable items are blended they cannot be separated by oral evidence. *Williams v. Toledo Coal Co.*, 25 Or. 426, 42 Am. St. Rep. 799, 36 Pac. 161; *Hughes v. Lansing*, 34 Or. 118, 75 Am. St. Rep. 574, 55 Pac. 97.

Thomas Armstrong, Jr., for Appellee.

"The rule seems to be that unless there is something to show a willful attempt to claim a lien for non-lienable articles the lien is not lost," and evidence is rightfully received to segregate lienable from non-lienable articles. *Gordon Hardware Co. v. San Francisco and S. R. Co.*, 86 Cal. 620, 25 Pac. 125; *Maynard v. Ivey*, 21 Nev. 241, 29 Pac. 1090; *Snell v. Payne*, 115 Cal. 218, 46 Pac. 1069; *Harmon v. San F. R. R. Co.*, 86 Cal. 617, 25 Pac. 124; *Dennis v. Smith*, 38 Minn. 494, 38 N. W. 695.

DOAN, J.—This is an action to enforce a mechanic's lien. The plaintiff in the court below, Moses Hughes, who is the sole proprietor of the foundry known as the Standard Iron Works in Phoenix, Arizona, furnished to the defendants Lockwood & Philes certain castings for the repair of a Huntington mill located on the Sacramento mill-site in Maricopa County. The first casting furnished was ordered on the 14th of January, 1901, at a price of fifteen dollars. This casting proved unsatisfactory, and was broken up and returned to the foundry by the defendants, who were credited with \$11.91 as its value for scrap-iron, and upon the order of the defendant Philes the other castings, consisting of a false bottom and three yokes, of the value of \$110.22, were then made at the foundry under his supervision, and were delivered to the defendants on February 26, 1901, and used by them in repairing the mill upon the mill-site aforesaid. The castings, except the credit

of \$11.91, were not paid for. On May 9, 1901, the plaintiff filed his claim for a mechanic's lien upon the aforesaid mill and mill-site, his verified account embracing all the above items at the price of \$125.22, and showing the credit thereon of \$11.91, stating the balance due to be \$113.31, and on July 31, 1901, brought this action for the foreclosure of the mechanic's lien. On March 18, 1901, one C. F. Chapman brought suit against the defendants Lockwood & Philes, attached the property herein mentioned, and recovered judgment therein against said defendants, and thereafter, on July 5, 1901, the property was sold by the sheriff of Maricopa County under the said judgment, and was purchased at the sheriff's sale by Lewis Wolfley.

On the trial of this case Wolfley filed a separate demurrer and answer to the complaint of Hughes, and contested the case in the lower court. The trial court overruled the demurrer to the complaint, and, after hearing the evidence, found that between the fourteenth day of January, 1901, and the twenty-sixth day of February, 1901, the plaintiff, Hughes, at the request of the defendants Lockwood & Philes, furnished and delivered to them certain castings for use upon and in the repair of the Huntington mill situated on the Sacramento mill-site; that the said castings were actually used in the repair of the said mill; that the defendants Lockwood & Philes agreed with the plaintiff to pay therefor on demand; that the castings furnished on the 14th of January were of the value of fifteen dollars, and those furnished on the 26th of February were of the value of \$110.22; that the plaintiff duly filed his claim for lien on account of furnishing the said materials on the ninth day of May, 1901, for the purpose of perfecting his mechanic's lien upon the mill and mill-site; that since the furnishing of said materials the defendant Lewis Wolfley has purchased the property in question, and is now the owner thereof; that the said Wolfley had actual as well as constructive notice of the lien of the plaintiff upon the said mill and mill-site prior to the time he purchased the same; that the plaintiff, on account of furnishing the materials on the aforesaid twenty-sixth day of February, is entitled to a lien upon the said mill and mill-site from and since the twenty-sixth day of February, 1901, for the said sum of \$110.22; that the defendant Wolfley is a subsequent pur-

chaser of the said property with a knowledge of plaintiff's lien, and his claims and rights in and to the said property are subordinate in time and in right to those of the plaintiff. Whereupon the court gave judgment for the plaintiff for \$110.22, and ordered the foreclosure of the lien upon the property for that amount. From this judgment and the order denying a new trial Wolfley appeals, and assigns as error, among others: (1) That the court erred in not sustaining the demurrer of the defendant Wolfley; (2) that the court erred in denying defendant Wolfley's motion to dismiss after plaintiff rested his case; (3) that the court erred in considering any evidence outside of that supplied by the lien in order to segregate the lienable from the non-lienable items therein contained; (4) that the court erred in permitting the introduction of or considering the lien as filed by the plaintiff.

In support of the first error assigned it is urged that the variance between the allegations of the complaint and the statements contained in the verified account, which was filed in compliance with the statute for the purpose of fixing and securing the lien, was fatal to the sufficiency of the complaint. The instances of variance cited, however, seem to us technical rather than material, and depend largely upon the construction given by the appellant to certain language used by the plaintiff. A careful examination of the complaint, and the copy of the notice of lien attached thereto and made a part thereof, satisfies us that there was no material variance between the allegations of the complaint and the statements contained in the verified account filed as claim and notice of lien, and that the complaint stated a good cause of action. The demurrer was therefore properly overruled.

Upon the close of the plaintiff's case the defendant Wolfley moved to dismiss the case on the ground of variance between the complaint and the evidence adduced in support thereof, and has assigned as error the court's denial of such motion. It is urged in support of this assignment of error, first, that the complaint and the notice of lien alleged a verbal contract, whereas the testimony showed that the defendants had simply ordered the material without agreeing upon any specified price, and the plaintiff had charged the reasonable value thereof after completion; and, second, that the notice and verified account filed for record, on which the complaint was

based, called for \$125.22 in the aggregate, and was composed of \$15 for the first item and of \$110.22 for the last, with the credit of \$11.91 given on the first item, and that on the hearing of the case the court excluded the first item of \$15, and the credit thereon of \$11.91, and gave judgment for the value of the last repairs, costing \$110.22, thus deciding that the plaintiff was not entitled to a lien for the first item, and that the blending of the item of \$15, for which the lien was refused, with the items costing \$110.22, for which the lien was allowed, destroyed the lien *in toto*.

An examination of the complaint and the verified account, and their comparison with the evidence introduced in the case, satisfies us that the former were substantially supported by the latter. The complaint alleges that the said castings were "furnished at the verbal request of said defendants, and consisted of a false bottom, a bottom, and three yokes for said mill, and were of the value of \$125.22; that said castings were so furnished to be used, and were actually used, in the repairing of said mill, and said defendants verbally agreed with the plaintiff to pay therefor on demand the said sum of \$125.22." The notice states that the "said work and labor consisted of the furnishing for said mill of certain castings, to wit, a false bottom, a bottom, and three yokes, for the benefit of said Lockwood and Philes; . . . that the said Hughes furnished the said material at the specified price of \$125.22 at the special instance and request of Lockwood and Philes, and the said materials were worth the sum of \$125.22."

The testimony of Hughes in his own behalf, corroborated by that of Philes, one of the defendants, sworn as a witness for the plaintiff, established that in January and February Philes bought from Moses Hughes a false bottom for the Huntington mill, and on February 26th a bottom and three yokes, amounting in all to \$125.22; that Philes ordered the repairs, and Hughes furnished them under the superintendence of Philes, who took them out and put them in the mill. The evidence of the plaintiff tended to establish the further fact that the first bottom was ordered on the 14th of January, and furnished at the price of fifteen dollars, and on its proving unsatisfactory it was returned, broken up, with some other iron, for which Hughes credited the defendants with \$11.91,

part payment, and received from them the order for the second repairs, which latter were furnished on the 26th of February at the price of \$110.22. This evidence was supplemented by the defendant, who introduced in evidence the bill rendered by Hughes to the defendants Lockwood & Philes, and the items taken from the order-book of Hughes referring to the ordering and furnishing of these repairs. The bill rendered and the entries in the order-book corroborated the above testimony of Hughes and Philes.

The contention is here made that the decision of the court that the plaintiff was not entitled to a lien for the first item, by reason of its having been furnished more than ninety days prior to the filing of the verified account and claim for a lien, vitiates the lien entirely. An examination of the numerous authorities cited in support of that contention leads us to believe that the lower court was justified in its ruling on this point. The first item was an item for which a lien would lie. The statement of the transaction was substantially correct. The articles were furnished as alleged. The only sense in which the first item could be designated as not a lienable item was in that the court considered that the two orders were separate, and not in the nature of continuous orders on one contract or account. The court held that notice of lien having been filed more than ninety days after the delivery of the first item, and less than ninety days after the delivery of the others, was not sufficient to fasten a lien upon the property in favor of the said first item, but was sufficient to fasten a lien for the others. The weight of authority in this class of cases sustains the decision in the case of *Gordon H. Co. v. San Francisco and S. R. R. Co.*, 86 Cal. 620, 25 Pac. 125, wherein it is stated that, when the claim of lien is made in part for items not protected by the lien, the court should permit the plaintiff by proof to segregate such items, and should declare a lien for the balance; the rule being that unless there is something to show a willful attempt to claim a lien for non-lienable articles the lien is not lost, and should be sustained for all those items in favor of which the evidence shows the lien to have been properly secured. There is in this case no evidence of fraud or bad faith on the part of the plaintiff. He was justified in believing himself entitled to a lien for the first item included

in his account, and, although the court decided against him in that particular, there was nothing in such decision or in his verified account or the complaint based upon it that would vitiate the lien in favor of the last item in the account, which embraced very nearly the entire amount in controversy.

The next error assigned is that the court erred in considering any evidence outside of that supplied by the lien in order to segregate the lienable from the non-lienable items therein contained. This objection is based upon the rule invoked in cases where a lumping charge has been made in support of an account composed of different items, some of which are of a character not entitled to be secured by a lien on the property, while others are entitled to the protection of a lien if properly secured, and the account or claim of lien fails to designate the items or amount for which the property is liable. It is held in such cases that when it is impossible from the complaint and account to determine what part of the account charged is secured by the lien, and what part is non-lienable or unsecured, the court will not permit parol evidence to be introduced to cure the defect, and therefore the entire lien is lost. *Williams v. Toledo Coal Co.*, 25 Or. 496, 36 Pac. 161, 42 Am. St. Rep. 799; *Hughes v. Lansing*, 34 Or. 118, 55 Pac. 97, 75 Am. St. Rep. 574. But in such cases as the one at bar, where all the items furnished were of such a character that the property would be liable therefor if a lien on behalf thereof had been filed within the proper time, but the dates given in the account show that, while the notice was filed in time to secure the lien on behalf of some, the others were excluded from the benefit of the lien by the limitation of time, the weight of authority favors the rule as given in the case of *Gordon H. Co.*, cited above.

The objection that the court erred in considering the lien in evidence, by which it is presumed the appellant meant the verified account filed for the purpose of securing the lien, is based upon the alleged fatal variance between the verified account and the complaint. The ruling hereinabove given upon this feature of the case disposes of that objection.

The record disclosing no reversible error on the part of the lower court, the judgment is affirmed.

Sloan, J., and Davis, J., concur.

[Civil No. 781. Filed March 20, 1903.]

[71 Pac. 912.]

**JOHN STOFFELO, Defendant and Appellant, v. MANUEL
L. MOLINA, Plaintiff and Appellee.**

1. **JUDGMENT—RECORD—EVIDENCE—SUFFICIENCY—WILLARD v. CARRIGAN**
8 ARIZ. 70, 68 PAC. 538 CITED.—To enable the appellate court to affirm a judgment of the lower court in favor of a plaintiff therein, the record must disclose some positive, affirmative evidence in support thereof.
2. **SAME—SAME—SAME—SAME—DESCRIPTIONS—FINDING.**—In an action in ejectment, where the only affirmative evidence in support of plaintiff's allegation of title was documentary, showing that plaintiff was the owner of a certain strip of land, it is insufficient to support a judgment in his favor, the description of the land in controversy being given in the complaint from local objects, and no evidence being introduced showing that the land described in the complaint was the same as that described in the documentary evidence.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Yuma. Webster Street, Judge. **Reversed.**

The facts are stated in the opinion.

Thomas Armstrong, Jr., and Pierce Evans, for Appellant.

W. F. Timmons, for Appellee.

DOAN, J.—An action in ejectment was brought in the district court of Yuma County, Arizona, on the twenty-ninth day of January, 1901, by Manuel L. Molina against John Stoffelo. The plaintiff set up in his complaint that on the thirty-first day of January, 1900, he was entitled to the possession of "all that certain parcel and piece of land situate, lying and being in lot 1, block 11, in the village of Yuma, county of Yuma, territory of Arizona, and bounded as follows, to wit: Commencing at the northwest corner of the store building belonging to the defendant, John Stoffelo, and now occupied by Robertson & Devane, druggists, and running thence northerly three and 8/10 feet; thence west-

erly about 95 feet to the eastern boundary line of the property owned and occupied by P. G. Cotter; thence southerly ten feet to a point 41 feet south of the southwest corner of C. D. Baker's lot in lot 1, block 11; thence easterly about 94 feet to the point of beginning''; alleged ouster and adverse possession by the defendant; and prayed for judgment for possession, damages, and costs. The defendant answered by general demurrer, general denial, and plea of not guilty. Abstracts of title were filed by plaintiff and defendant; also certified copies of the conveyances mentioned in said abstracts. No oral testimony whatever was introduced. No evidence of possession or dispossession was offered by either party. The plea of not guilty, however, admitted the possession by defendant of the property described in the complaint. The case was submitted to the court on the documentary evidence, and, solely upon the title papers submitted, the court found as a fact that the plaintiff was the owner of and entitled to the possession of the premises as described in the complaint, and rendered judgment in favor of the plaintiff for such possession and for costs. A motion for a new trial was denied, and an appeal was taken from such judgment and order.

The appellant has assigned as errors the following: "First. The court erred in giving judgment for the plaintiff, for the reason that no testimony whatever was offered showing that plaintiff had any title to the land in question. Second. The court erred in giving judgment for the plaintiff upon the deeds submitted to it, for the reason that . . . it is impossible to determine from the inspection of said deeds alone what land was claimed by the plaintiff. Third. The court erred in giving judgment for the plaintiff, for the reason that no testimony was submitted identifying the land described in the complaint as the same as that described in the deeds of conveyance to the plaintiff, and without such testimony it is impossible to identify such land."

The deeds placed in evidence establish the title in different persons to different parts of the said lot 1, block 11. It is satisfactorily established by this documentary evidence that the plaintiff, Manuel L. Molina, is the owner of a strip of land six feet ten inches in width by one hundred and forty-three feet in length in the east half of said lot and block,

the north line of said strip being parallel to and two hundred and fifty-six feet one inch south of the north line of said lot 1; that one J. M. Molina was at one time the owner of a strip of land thirty-eight feet wide on the west end, one hundred and thirty-three feet long on the south side, about twenty-seven feet wide at the east end, and one hundred and forty-three feet long on the north side immediately south of and adjoining the strip of land owned by the plaintiff, Manuel L. Molina; and that the said J. M. Molina executed a deed to the defendant, Stoffelo, purporting to convey to him the south half of said lot 1 in block 11. There is no evidence in the record that Stoffelo's grantor ever had any title to or right to convey any other part of the south half of the said lot 1, block 11, than the thirty-eight-foot lot above mentioned, and lying south of and adjoining the land of plaintiff. Neither is there any evidence in the record that the defendant Stoffelo ever claimed title to or had possession of any other, or that there is any conflict between said thirty-eight-foot lot and the strip of land six feet ten inches wide owned by plaintiff. There is no evidence whatever that the land described in the complaint was any part of that to which title is shown in the plaintiff. There is no evidence establishing or tending to establish the fact that there is a store building belonging to John Stoffelo anywhere on said lot and block or elsewhere. There is no evidence whatever as to the eastern boundary line of the property owned and occupied by P. G. Cotter, or that P. G. Cotter owns any property whatever in lot 1 or elsewhere. There is no evidence whatever to locate the southwest corner of the property of C. D. Baker in said lot 1, block 11. Neither the abstract of title nor any of the deeds placed in evidence contain in them the mention of the name of C. D. Baker or P. G. Cotter. The court, therefore, erred in finding that the plaintiff was the owner of and entitled to the possession of the land described in the complaint, because there was no evidence in the case on which to base such finding.

The rule that has prevailed in this court that the findings and judgment of the lower court will not be disturbed for want of evidence where the record discloses any competent evidence in support thereof (*Willard v. Carrigan*, 8 Ariz. 70, 68 Pac. 538, and cases cited) is predicated upon the elementary principle that it requires some evidence to sup-

port a finding and judgment for plaintiff. To enable this court to affirm a judgment of the lower court in favor of a plaintiff therein, the record must disclose some positive, affirmative evidence in support thereof. *Crawford v. Birkins*, 16 Colo. App. 532, 66 Pac. 687; *Stamm v. City of Albuquerque*, 10 N. M. 491, 62 Pac. 973; *Silberhorn v. Wheaton* (Cal.). 51 Pac. 689. In this case the only affirmative evidence in support of plaintiff's allegation is the documentary evidence of title to the certain tract of land described by courses and distances from a given point on the east line of lot 1 of block 11, and located within that lot, which contains more than one hundred times as great an area as plaintiff's tract. The description of the tract of land in controversy is given in the complaint from local objects, being the corners of buildings, or of tracts of land, owned or occupied by other persons, but there is not found in the record any evidence whatever relative to any of such local objects, either buildings or tracts of land, the lines or corners of which are mentioned in said description. It might have been susceptible of proof that the description by corners of buildings, lines, and corners of lots referred to in plaintiff's complaint would indicate a piece of land located partially upon the tract to which plaintiff proved title; but this was not done, and, in the absence of any evidence whatever to that effect, the judgment in favor of the plaintiff must fall. It may be possible that the plaintiff can on a new trial in the lower court either support the description in his complaint by evidence that will locate the land therein described, or a part of it, upon the tract of land to which he has established title, or that he may amend his complaint by such fuller and further description as may enable him to establish such location; but he has certainly entirely failed to do so in the case at bar.

The judgment of the lower court is reversed, and the case is remanded for a new trial.

Kent, C. J., Sloan, J., and Davis, J., concur.

[Civil No. 784. Filed March 20, 1903.]

[71 Pac. 935.]

MARTIN COSTELLO, Plaintiff and Appellant, v. SAMUEL FRIEDMAN et al., Defendants and Appellees.

1. **TRUSTS — TO DEFAUD CREDITORS — EVIDENCE — BURDEN OF PROOF.**—Where a plaintiff seeks to show that property is held in trust in fraud of creditors, the burden is upon him to establish that fact by full, clear, and convincing evidence.
2. **SAME — OPTION TO PURCHASE — TITLE — REMAINS IN VENDOR UNTIL PAYMENT.**—Evidence that a purchaser at an execution sale agreed with the judgment debtor that on payment to him of the purchase price, with interest thereon, he would reconvey the same, and that the judgment debtor paid part of the purchase price, but failed to pay the balance, does not create any trust in favor of the judgment debtor, but a mere option to purchase, and the title to the property remains in the vendor until the payment of the purchase price.
3. **APPEAL AND ERROR—FINDINGS—EVIDENCE—SUFFICIENCY—REVIEW.**—Sufficient evidence appearing in the record to support the findings of the lower court, they will not be disturbed on appeal.
4. **EXECUTION — SALE — PURCHASER — ACQUIRES DEBTOR'S TITLE — NO MORE.**—A purchaser under judicial sale acquires just such title as the execution debtor had at the time of such sale, and if the execution debtor was not the owner of the property at the time of the sale, the purchaser acquires no title thereto.
5. **EQUITY—SPECIFIC PERFORMANCE—RIGHT TO—DEPENDENT UPON PERFORMANCE OF ALL CONDITIONS PRECEDENT.**—The right to specific performance is dependent upon full performance by a vendee, or any one in his right, of all conditions precedent required from him.
6. **EXECUTION—SALE—SHERIFF'S DEED—STANDS ON SAME FOOTING AS WOULD DEBTOR'S.**—Where a judgment debtor could not have executed a deed conveying certain property which he had contracted to purchase, without full payment and full performance of the purchase agreement on his part, the sheriff's deed to said premises, based upon sale under execution against such debtor, could convey no title thereto.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. George R. Davis, Judge. **Affirmed.**

The facts are stated in the opinion.

James Reilly, and Herring & Mitchell, for Appellant.

Wright & Fleming, for Appellees.

The burden of proving a trust rests upon him who asserts it, and it is not enough to generate doubt and uncertainty. *Lehman v. Lewis*, 62 Ala. 129; *Whitmore v. Learned*, 70 Me. 276; *Neyland v. Bendy*, 69 Tex. 711, 7 S. W. 497; *Green v. Dietrich*, 114 Ill. 636, 3 N. E. 800.

DOAN, J.—On the 12th of July, 1895, the property in dispute in this case—a town lot in the town of Benson, Cochise County, Arizona—was sold to P. J. Delahanty by the sheriff under an execution issued upon a judgment in the district court in favor of Harris & Co. against Samuel Friedman. No redemption having been made, the sheriff afterward, on May 13, 1896, executed a deed conveying the lot to Delahanty. On May 10, 1899, the same property was again sold by the sheriff of Cochise County to Martin Costello under an execution issued out of the same court on a judgment recovered on May 18, 1896, by Martin Costello against the said Samuel Friedman; and, no redemption having been made, the sheriff afterward, on November 16, 1899, executed a deed conveying the said lot to Costello.

It is conceded that the legal title to the said property has been in the defendant Delahanty since May 13, 1896, but the contention of the plaintiff below (appellant in this case) is that Delahanty has held the legal title simply in trust for Friedman, who at the time of the sale to Costello was the equitable owner of the property. This action was brought by Costello to have his title under the sheriff's deed settled and quieted. It was alleged in the complaint that, at the time of the sheriff's sale of the lot to Delahanty, Friedman, with the intent and purpose of hindering, delaying, and defrauding his creditors, procured Delahanty to advance the money to purchase the said lot, and to take the title thereto in his (Delahanty's) name, and hold the same for him (Friedman) as security for the repayment of said advances and interest, and that Delahanty agreed with Friedman to advance the money to purchase the said lot, and to take the title thereto, and to hold the same for Friedman as security for the money advanced, and that Delahanty purchased the lot

and took the title thereto in pursuance of the said agreement; that Friedman had paid to Delahanty all the money advanced by Delahanty for the purchase of the lot, with interest thereon, but declined to cause Delahanty to reconvey the lot to him, preferring to let the title to the same remain in Delahanty, for the purpose and with the intent of hindering, delaying, and defrauding his creditors, and particularly the plaintiff, of their just demands; that for two years prior to May 10, 1899, Friedman was the equitable owner of the property, and Delahanty held the title thereto in trust for him. Delahanty, in his answer, denied that at any time he held the title to the lot in trust for Friedman. Denied that he purchased the lot at the said sale because of any agreement between himself and Friedman. Denied that Friedman had any part in the said premises, or was in any way or to any extent interested therein, but alleged that, after the purchase by him of the lot at the said sale, he entered into an oral agreement to and with Friedman whereby it was agreed that Friedman should retain the possession of the property, keep the same in repair, pay all taxes, and pay to Delahanty the amount the property had cost him to purchase it at the said sale, together with interest, and that Delahanty agreed, on his part, that he would, on full compliance by Friedman with the said agreement, then convey the said lot to Friedman; that pursuant to said agreement, and by virtue thereof, Friedman retained possession of the property, paid all taxes thereon, and paid to Delahanty a portion of the purchase price; that Delahanty demanded of Friedman the remainder due him on said agreement, and notified Friedman that, unless such remainder were paid, he would at once rescind and end said agreement; that Friedman on such demand refused to pay the balance due, and advised Delahanty that he would not pay the same, and that he was content to have the said contract rescinded and ended, whereupon the said agreement was, by the consent of both parties, ended and rescinded. The answer of Friedman alleged that Delahanty was the owner in fee simple of the premises in question, and that Friedman had no interest in said property, at law or in equity; that Friedman had occupied the premises as a tenant of Delahanty ever since the said Delahanty acquired title thereto.

These allegations and denials in the pleadings placed directly before the court, as the main or controlling issue in the case, the question whether Delahanty acquired the property at the sheriff's sale in such manner that there was a trust impressed upon it in favor of Friedman, that would constitute an equitable interest that might be asserted by Friedman, or that might be levied on, as against Friedman, by the creditors of the latter, and therefore held it as a trustee for Friedman, or purchased the property in his own interest, and acquired the absolute title thereto, and, after such purchase and acquisition of title, agreed to sell it to Friedman under such circumstances as rendered such agreement practically an option to purchase, which latter would convey no interest or title to Friedman until full compliance with the terms of such agreement, and the payment of the price mentioned. Having tried the case upon this theory, the court found "that on the said 12th day of July, 1895, all of the said property was purchased at execution sale by the defendant P. J. Delahanty, who thereafter, and in due course, procured a sheriff's deed to the same, and that from thence hitherto the said defendant Delahanty has been, and now is, the sole owner of the said property; that the execution sale of said property to the plaintiff made by the sheriff of Cochise County on the 10th day of May, 1899, by virtue of a judgment rendered by this court on the 18th day of May, 1896, in a case entitled 'Martin Costello against Samuel Friedman,' is and was void and of no effect; that the defendant Friedman has no interest in the case in controversy; . . . that the defendant Delahanty is the sole owner of the property in controversy herein, and is entitled to have the same quieted in himself." In accordance with these findings, the court rendered judgment quieting the title to the property in Delahanty, giving him possession of the premises and his costs in the cause expended.

The appellant presented in his brief six several assignments of error, but, instead of discussing them in detail, he urged in his brief what he called the fundamental question upon which the decision of the case must depend, namely, whether the agreement between Delahanty and Friedman vested the equitable title to the lot in dispute in Friedman. Instead, therefore, of taking up the several assignments of

error *seriatim*, we will consider the case as presented by the appellant in his argument.

The allegations of the complaint were sufficient, if supported by evidence, to impress the property with a trust in behalf of Friedman. These allegations were, however, denied in the verified answer of Delahanty; and the record discloses very little, if any, evidence in their support. The lower court was therefore fully justified in holding that the plaintiff had failed to establish the allegation that Delahanty purchased the lot as trustee for Friedman.

The appellant, in recognition of this fact, has receded from his first position—that Delahanty took the lot as trustee by agreement with Friedman—and rests his entire case in this court upon the theory that although Delahanty purchased the lot for himself, and acquired the absolute title thereto, yet the agreement between Delahanty and Friedman, as set up in the answer, made after the purchase of the lot by the former, vested in the latter the equitable title to the lot in dispute, and that, as the result of that agreement and the partial payment made thereunder, Delahanty had for about two years prior to the sheriff's sale to Costello held the title to the lot in trust for Friedman. This theory of the case would necessitate the establishment of the trust claimed to have been thus created, by full, clear, and convincing evidence. It is incumbent upon the plaintiff, in order to have a trust declared, to furnish the evidence to convince the court. The only evidence on this subject contained in the record is that furnished by the verified answers of the defendants, and Delahanty's testimony on the trial. These show that after Delahanty had purchased the property, and acquired the title thereto, he agreed with Friedman that upon the payment by the latter of the purchase price of the property, with interest thereon, he (Delahanty) would then convey the lot to him, and that, in pursuance of the agreement, Friedman paid part of such purchase price, but failed to pay the balance, and that, because of the full purchase price not having been paid, Delahanty did not convey the title; that Friedman had occupied the property as tenant of Delahanty, and had no interest therein, in law or equity. We find no facts or circumstances put in evidence by the plaintiff to convince the mind of the court that any title had yet passed

to Friedman, or that would take this transaction out of the general rule that in case of an option to purchase, or a conditional purchase dependent upon payment, the title to the property remains in the vendor until the performance of the conditions by the vendee, and the payment of the purchase price. The record discloses sufficient evidence to sustain the finding of the lower court that no title had passed to Friedman, but that Delahanty was the sole owner of the property; and, in observance of the rule invariably followed by us in such cases, we will not disturb that finding.

No title having passed to Friedman, it necessarily follows that there was nothing on which to levy the execution issued upon the judgment in favor of Costello against Friedman; and the sheriff's sale thereunder in May, 1899, to Costello, conveyed no title. It is elementary that a purchaser under judicial sale acquires just such title as the execution debtor had at the time of such sale, and, if the execution debtor was not the owner of the property at the time of the sale, the purchaser acquires no title thereto.

The appellant has very forcibly urged that the purchase agreement between Friedman and Delahanty would have sustained an action on Friedman's part for specific performance. It is not necessary to inquire if Friedman could have enforced specific performance, or if the appellant might have acquired by transfer from Friedman, or, after proper legal procedure, might, even by decree of court, have been subrogated to Friedman's right, and in such right have enforced specific performance of the contract. The fact remains that he did not do so. Specific performance could only be demanded by Friedman, or any one in his right, upon full performance of conditions precedent required from him. Story, sec. 771. *Colson v. Thompson*, 2 Wheat. 336-341, 4. L. Ed. 253. That had not been done in this instance, or tendered, either by Friedman or by Costello for him.

Costello is not now demanding a specific performance of the contract of purchase by virtue of Friedman's right thereto, but has attempted to sell the property of Delahanty under a judgment against Friedman, which course could only be sustained upon the theory that Friedman had already acquired title thereto. Whether Friedman might have sold or assigned his right to the enforcement of the contract, which

was a personal right, to a third party, and such third party might, after full performance on their part and full payment of the purchase price, have enforced against Delahanty a specific performance, is immaterial. Friedman could certainly not, in the present status of the case, without full payment and full performance of the purchase agreement on his part, have sold the property thus contracted for to a third party, and have executed a deed that would convey any title. The sheriff's deed to Costello in this instance stands upon the same footing as would a deed to the property made by Friedman to some third party before he (Friedman) had fully complied with the purchase agreement with Delahanty, paid the purchase price, and acquired the title to the property.

The judgment of the lower court is affirmed.

Kent, C. J., and Sloan, J., concur.

[Civil No. 787. Filed March 20, 1903.]

[71 Pac. 946.]

COUNTY OF COCHISE et al., Defendants and Appellants,
v. COPPER QUEEN CONSOLIDATED MINING
COMPANY, Plaintiff and Appellee.

1. TAXES AND TAXATION—ILLEGAL ASSESSMENT—APPEAL—REMEDY.—

Prior to the revision of 1901 the statutes gave no right of appeal from the board of equalization, nor was any other legal remedy afforded by the statutes for the correction of any illegal or fraudulent assessment of property.

2. SAME—VALUATION—EXCESS—EQUITY — INJUNCTION — WHEN WILL

NOT LIE.—Mere errors or excess in the valuation, or hardship or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax.

3. PLEADING—FRAUD—ALLEGATION — SUFFICIENCY.—To characterize an

act as "fraudulent" does not, in legal effect, charge it as fraudulent, unless some circumstance or fact be charged which shows in what the fraud consists and how it has been effected.

4. **TAXES AND TAXATION—BOARD OF EQUALIZATION—POWERS—DISCRETION.**—The revenue laws in conferring upon boards of equalization power to equalize assessments, and to add to and increase the same, confer a wide discretion upon said boards, which discretion must however be a sound one, exercised in good faith, and not arbitrarily and capriciously.
5. **SAME—SAME—ERRONEOUS JUDGMENT—EQUITY WILL NOT RELIEVE.**—Whenever it appears that an assessor or board of equalization has exercised discretion and judgment in assessing property, no matter how erroneous such judgment may be, a court of equity will not disturb the action of such assessor or board.
6. **SAME—SAME—DISCRETION—FAILURE TO EXERCISE—ARBITRARY ACTION—EQUITY WILL GRANT RELIEF.**—If an excessive valuation of property be made without the exercise of judgment as to the true value of such property, and be made arbitrarily, and for purposes of oppression, such arbitrary action constitutes fraud, against which a court of equity will grant relief.
7. **SAME—TAXING OFFICERS—FRAUDULENT INTENT AND PURPOSE—NOT JUST GROUND OF COMPLAINT WITHOUT OVERVALUATION.**—A fraudulent purpose and intent on the part of the taxing officers is not enough alone to justify the interposition of a court of equity, but there must also be an overvaluation to constitute a just ground of complaint.
8. **SAME—PLEADINGS—COMPLAINT—SUFFICIENCY—FRAUD.**—A charge in a complaint that the board of equalization did, without inquiry or evidence, arbitrarily raise the assessment of plaintiff's property, and that they did this with the design and purpose of forcing plaintiff to pay an unequal and unfair portion of taxes, without the additional charge of excessive valuation, is an insufficient allegation of legal fraud.
9. **SAME—ACTION TO RESTRAIN COLLECTION—PLEADINGS—COMPLAINT—OVERVALUATION—ALLEGATIONS—SUFFICIENCY.**—In an action to restrain the collection of taxes, there is in effect a charge of overvaluation, where the complaint states that the board of equalization arbitrarily and without inquiry raised the assessments of the improvements on plaintiff's mines in the amount of sixty thousand dollars in excess of the full cash value thereof.
10. **SAME—SAME—SAME—SAME—SAME—SAME—SAME.**—In an action to restrain the collection of taxes, there is not an unequivocal allegation that there was an overvaluation by the board, where the complaint states that the board of equalization, for the purpose of placing an unfair burden on plaintiff, raised the valuation of the patented mining claims owned by it, to the exclusion of other like property in the county; that the board heard no evidence concerning the cash value of the property, but arbitrarily fixed the value thereof, with the intent to discriminate against it; and that on plaintiff's

information and belief the valuation by the board on the mining claims was, "according to any just method of arriving at the cash value of such property, grossly excessive."

11. ~~SAME—SAME—SAME—SAME—SAME—SAME—SAME.~~—In an action to restrain the collection of taxes, there is not an unequivocal allegation that there was an overvaluation by the board, where the complaint states that the board of equalization adopted the general rule of assessing merchandise at seventy-five per cent of the invoice price thereof; that the board was informed that the invoice price of all plaintiff's merchandise was about two hundred and twenty thousand dollars, and proof of the same was offered; and the board assessed the merchandise in the sum of \$293,875.
12. ~~SAME—SAME—OVERVALUATION—FINDINGS—SUFFICIENCY.~~—In an action to restrain the collection of taxes on the ground of overvaluation, the court's finding that the board of equalization arbitrarily increased the valuation of plaintiff's property for the purpose of imposing an unjust burden of taxation is incomplete, in that it fails to find the true cash value of the property and the taxes due thereon.
13. ~~SAME—SAME—SAME—RELIEF.~~—In redressing a wrongful overvaluation of property for taxation the court should find the true cash value of the property, and enjoin the collection of only so much of the taxes assessed as were based on the valuation in excess of the true cash value, although the assessed valuation of other like property is below the true cash value thereof.
14. ~~FINDINGS—SUFFICIENCY—TO SUSTAIN JUDGMENT.~~—The findings of the court must cover sufficient of the issues raised by the pleadings to sustain the judgment.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Cochise. George R. Davis, Judge. Reversed.

Affirmed on rehearing. See opinion, *post*, p. 459.

The facts are stated in the opinion.

Edward W. Land, District Attorney, Allen R. English, and W. C. McFarland, for Appellants.

The allegations that defendant board acted fraudulently, unlawfully, arbitrarily, and with intent to wrong, defraud, and oppress the plaintiff, are mere conclusions of law, and only express the pleader's opinion. The further allegation that the board acted fraudulently, unlawfully, and for the

purpose of placing an unfair and undue burden upon plaintiff, was also a mere conclusion of law, and only expresses the pleader's opinion. *Grand Valley Irr. Co. v. Lesher*, 28 Colo. 273, 65 Pac. 44.

Allegations which consist of mere conclusions of law and opinions of the pleader, without any statement of the facts from which these conclusions are drawn or upon which the pleader's opinions are based, are insufficient, and hence the demurrer should have been sustained for failure to state facts constituting a cause of action. *Piccotte v. Watt*, 3 Idaho, 447, 31 Pac. 805; *History Co. v. Dougherty*, 3 Ariz. 387, 29 Pac. 649; *Callahan v. Broderick*, 124 Cal. 80, 56 Pac. 782; *Griffith v. Wright*, 21 Wash. 494, 58 Pac. 583; *Weber v. Dillon*, 7 Okla. 568, 54 Pac. 894; *Hieronymus v. New York Nat. D. and L. Assn.*, 101 Fed. 12; *Naddo v. Bardon*, 47 Fed. 782; *Gould v. Evansville etc. Ry. Co.*, 91 U. S. 526, 23 L. Ed. 416; *Lockhart v. Leeds*, 10 N. M. 568, 63 Pac. 48; *Sterling Gas Co. v. Higby*, 134 Ill. 557, 25 N. E. 660.

No facts are alleged showing the cash value of plaintiff's property, or the cash value of the patented mine or mines, the assessed valuation of which were not raised or added to by the defendant board; hence no facts are alleged showing that plaintiff's property was assessed at more than its cash value, or that other patented mines were assessed at less than their cash value. No facts alleged showing that the patented mine or mines, the assessed value of which were not raised by the board, were "like properties" of the plaintiff, either in value or returns; hence no facts are alleged showing that the action of the board was to discriminate against, or to place an unfair and undue burden upon plaintiff. *Pacific Postal Tel. Co. v. Dalton*, 119 Cal. 604, 51 Pac. 1072; *Eureka Dist. Gold Min. Co. v. Ferry Co.*, 28 Wash. 250, 68 Pac. 727; *Siegfried v. Raymond*, 190 Ill. 424, 60 N. E. 868; *Weber v. Dillon*, 7 Okla. 568, 54 Pac. 894.

There is no allegation that at the time the valuation of the plaintiff's property was raised and added to the defendant board knew there was a large number, or any number at all, of the three hundred and twenty-two mining claims, other than those of the plaintiff, of great value, or any value at all, or yielded large returns, or any returns at all, during the year 1901, nor are any facts alleged showing that any of

them were of any greater value than that returned by the assessor; hence no facts are alleged showing the exclusion of other "like property," or that the purpose of the board was to place an unfair and undue burden on the plaintiff. *Eureka Dist. Gold Mining Co. v. Ferry Co.*, 28 Wash. 250, 68 Pac. 727; *People v. McCreery*, 34 Cal. 432; *City of Muscatine v. Mississippi etc. Ry. Co.*, 1 Dill. 537, Fed. Cas. No. 9971.

The allegation that the board of equalization, at their session in the month of July, 1901, well knew that there were several thousand unpatented mining claims in said county of Cochise of great value, and that said board failed and neglected to require the assessor to enter upon the assessment-roll of said county the said unpatented claims, or any of them, by reason whereof the whole burden of taxation was laid upon the patented mining claims, constitutes no cause of action, and does not show fraudulent conduct upon the part of the defendants, nor discrimination against the plaintiff, for the reason that unpatented mines or mining claims are not subject to assessment or taxation. Rev. Stats. 1887, par. 2631; Organic Act, sec. 15, Rev. Stats. U. S., sec. 1851; *Salisbury v. Lane*, 63 Pac. 383; *Goldhill v. Caledonia etc. Co.*, 5 Saw. 275, Fed. Cas. No. 5512; *Mammoth Mining Co. v. Juab Co.*, 37 Pac. 348; *Eureka Dist. Gold Mining Co. v. Ferry Co.*, 28 Wash. 250, 68 Pac. 727.

The facts alleged do not constitute grounds for equitable interference. Courts of equity will refuse to restrain the collection of taxes, unless the facts alleged show that the tax was assessed upon property not subject to taxation, or that the tax was unauthorized by law. High on Injunctions, sec. 488; *Dows v. Chicago*, 11 Wall. 108, 20 L. Ed. 65; *Shelton v. Platt*, 139 U. S. 591, 11 Sup. Ct. 646, 35 L. Ed. 273.

The equitable powers of the court can only be invoked where the plaintiff has no plain and adequate remedy at law. In this case the plaintiff's remedy at law was adequate and complete, "either by action against the officer making the collection or the body to whom the tax was paid." If the tax was illegal, the plaintiff protesting against its enforcement might have had his action against the officer or the county to recover back the money, or he might have prosecuted either for damages. No irreparable injury would have

followed to him from its collection. Nor would he have been compelled to resort to a multiplicity of suits to determine his rights. His entire claim might have been embraced in a single case. *Dows v. Chicago*, 11 Wall. 108, 20 L. Ed. 65; *Erskine v. Van Arsdale*, 15 Wall. 75, 21 L. Ed. 63; *State Ry. Tax Cases*, 92 U. S. 575, 23 L. Ed. 669; *Savings and Loan Assn. v. Austin*, 46 Cal. 486; *New Haven Clock Co. v. Kochersperger*, 175 Ill. 383, 51 N. E. 629; *Rose v. Durham*, 10 Okla. 373, 61 Pac. 1100.

Where one seeks to enjoin the collection of a tax on the ground of excessive valuation or fraudulent conduct of the board in increasing the valuation of the property over the returned valuation, plaintiff must allege his property was returned for assessment at its true cash value. Any petition for injunction which fails to allege this fact will be held bad on demurrer. *Martin v. Clay*, 8 Okla. 46, 56 Pac. 715; *Streight v. Durham*, 10 Okla. 361, 61 Pac. 1096; *Alva State Bank v. Renfrew*, 10 Okla. 26, 62 Pac. 285; *First Nat. Bank v. Douglass County*, 3 Dill. 330, Fed. Cas. No. 4799; *Cranmer v. Williamson*, 8 Okla. 683, 59 Pac. 249.

The allegation in the complaint upon information and belief that the valuation placed by the board of equalization upon the patented mines of plaintiff, as aforesaid, is, according to any just known method of arriving at the full cash value of such property, grossly excessive, etc., is not an allegation that the property of plaintiff was assessed or that the board raised the value to an amount in excess of its cash value; hence the demurrer, for want of equity, should have been sustained. *Martin v. Clay*, *supra*; *Streight v. Durham*, *supra*.

It is not alleged that the valuations placed by the board on plaintiff's property were excessive or more than their cash value; hence no facts are alleged showing that the action of the board resulted in any injury to the plaintiff. If the assessed valuation of the property of the plaintiff was not raised to an amount in excess of or above the cash value, no injury or wrong is shown. Where one complains of the fraudulent conduct of another, it is necessary that facts be alleged showing some injury resulting from such conduct. It is only fraudulent conduct of the board that results in excessive valuation that constitutes ground for equitable re-

lief. *Keokuk etc. Bridge Co. v. People*, 161 Ill. 132, 43 N. E. 691; *Clement v. People*, 177 Ill. 144, 52 N. E. 382; *Spencer v. People*, 68 Ill. 510.

There can be no wrong or injury resulting from a correct valuation placed upon plaintiff's property, "and the courts cannot examine the mode of reasoning or the basis adopted to ascertain the value of the property, unless the mode of reasoning or basis adopted results in excessive or overvaluation of properties of plaintiff." *Republic Life Ins. Co. v. Pollak*, 75 Ill. 292; *Porter v. Rockford etc. Ry. Co.*, 76 Ill. 561; *Siegfried v. Raymond*, 190 Ill. 424, 60 N. E. 868; *Dundee Mfg. etc. Co. v. Charlton*, 32 Fed. 192, 13 Saw. 25.

It may be there was inequality and want of uniformity in the assessment of property in Cochise County for the year 1901, and it is possible that, in a general way, the allegations in the complaint may show the existence of this condition, but, as said by Judge Miller, in the railroad tax cases, "Perfect equality and perfect uniformity of taxation as regards individuals or corporations, or the different classes of property subject to taxation, is a dream unrealized." *Railroad Tax Cases, supra*.

"To these boards of revision, or whatever name they may be called, the citizen must apply for relief against excessive or irregular taxation where the assessing officers had jurisdiction to assess the property. Their action is judicial in character. They pass judgment on the value of the property, upon personal examination and evidence respecting it. Their action being judicial, their judgment, in cases within their jurisdiction, are not open to collateral attack. If not corrected by some of the modes pointed out by statute, they are conclusive, whatever errors may have been committed in the assessment." *Stanley v. County of Albany*, 121 U. S. 535, 7 Sup. Ct. 1234, 30 L. Ed. 1000; *Standard Oil Co. v. Magee*, 191 Ill. 84, 60 N. E. 802; *Oregon and W. M. Sav. Bank v. Jordan*, 16 Or. 113, 17 Pac. 621; *New Haven Clock Co. v. Kochersperger*, 175 Ill. 383, 51 N. E. 629; *People v. McCarthy*, 102 N. Y. 631, 8 N. E. 85; *Camp v. Simpson*, 118 Ill. 224, 8 N. E. 308.

The court erred in overruling defendant's demurrer, distinctly specifying the ground of objection, charging the defendants with placing an unfair and undue burden upon plaintiff

by raising the valuation of plaintiff's patented mining claims to the exclusion of other like property in the county, for the reason that it is not alleged that the property of the plaintiff is assessed at more than its cash value, and for this reason bears an undue and unfair burden, nor that the valuation of the properties, alleged to have been excluded were assessed at less than their real value, or that the excluded properties were of any value at all. *State v. Durham*, 10 Okla. 361, 61 Pac. 1096; *Alva State Bank v. Renfrew*, 10 Okla. 26, 62 Pac. 285; *First Nat. Bank v. Douglass County*, 3 Dill. 330, Fed. Cas. No. 4799; *McCurdy v. Prugh*, 59 Ohio St. 465, 55 N. E. 154; *Weber v. Dillon*, 7 Okla. 568, 54 Pac. 894.

Herring & Mitchell, for Appellee.

SLOAN, J.—This is an appeal from a decree entered by the district court in Cochise County enjoining the county of Cochise and M. D. Scribner, treasurer and *ex officio* tax-collector of said county, from collecting or attempting to collect from the appellee, the Copper Queen Consolidated Mining Company, taxes levied for the year 1901, in excess of a specific sum found to be due from the appellee for that year.

It was alleged in the complaint that the county assessor of said county listed for the year 1901 all the property of the Copper Queen Consolidated Mining Company owned by it on the first Monday of February, 1901, and assessed the same at sums aggregating \$368,139.76; that said list included sixty-five patented mining claims, improvements consisting of hoisting works, pumping and other machinery on the same, a stock of merchandise, surveyor's instruments, an assay outfit, and twenty work horses; that at its July meeting the board of equalization, after due notice, raised and added to the assessment of said property, as made by said assessor, as follows; The sum of \$3,150,000 was added to the valuation of the patented mines and the improvements thereon. The sum of \$203,520 was added to the valuation of the stock of merchandise. The sum of \$375 was added to the valuation of the surveyor's instruments. The sum of \$400 was added to the valuation of the horses. The sum of \$600 was added to the valuation of the assaying outfit. That this made a total

increase in the valuation of the company's property by the board of equalization, over that made by the county assessor, of the sum of \$3,464,895. That the board of equalization, at said meeting, after notice, added to the list of property assessed to the company fourteen patented mines which had formerly been the property of the Lowell and Arizona Copper Smelting and Mining Company, and raised the valuation of these mines to the amount of \$54,000.

The complaint further averred that for many years it had been the custom in Cochise County to list patented mining claims as land, and to assess the same at the uniform valuation of five dollars per acre; that the assessment-roll of said county for the year 1901 included three hundred and twenty-two patented mining claims, which were assessed at the total valuation of \$3,676,831; that notwithstanding the fact that many of these patented mining claims not owned by the plaintiff were of great value, and had yielded large returns during the preceding year, which facts were well known to the board of equalization, yet said board, fraudulently, and for the purpose of placing an unfair and undue burden upon the plaintiff, raised the valuation of the patented mining claims owned by it, to the exclusion of other like property in the county, so that, of the total valuation placed upon the said three hundred and twenty-two patented mining claims, the plaintiff was assessed upon the claims owned by it the sum of \$3,204,000; that the said board in making the said assessment made no investigation into, and heard no evidence concerning, the cash value of said mining claims, and made no determination or finding thereof, but acted in the premises arbitrarily, and with the intent to wrong, defraud, and oppress the plaintiff, and to discriminate against it.

Plaintiff further alleged, "upon information and belief," that the valuation placed by the said board upon its said patented mining claims was, "according to any just known method of arriving at the cash value of such property, grossly excessive."

It was further alleged in the complaint that there were within Cochise County during the year 1901 several thousand unpatented mining claims, which had not been assessed and had not been included in the tax-list or the assessment-roll for said year; that the board of equalization, at the time

they added to the assessment of the plaintiff's property, well knew of the existence of these unpatented mining claims, and that they were of great value, and that the assessor of the county had failed to list and assess the same, yet failed and neglected to require the assessor to enter the same upon the assessment-roll, and arbitrarily and without right attempted to assess only patented mining claims in said county, thereby laying the whole burden of the taxation levied upon the class of property known as "mining claims" upon such only as were patented, leaving the unpatented mines free from any taxation whatever.

The complaint further alleged that the board of supervisors fraudulently, and with the unlawful design of forcing the plaintiff to pay an unequal and unfair portion of the taxes of the county for the year 1901, arbitrarily and without inquiry in the matter, and without any evidence before them, raised the assessment on the hoisting works and improvements upon said patented mines in the amount of sixty thousand dollars in excess of the full cash value of said property.

With regard to the assessment of the stock of merchandise, the complaint charged that the board of equalization, in equalizing the taxation for the year 1901, adopted the general rule of assessing such property at seventy-five per cent of the invoice price thereof; that the superintendent of the plaintiff company informed the board that the invoice price of all the merchandise owned by it on the first Monday of February, 1901, was about two hundred and twenty thousand dollars, and offered to produce proof thereof, but, notwithstanding such avowal and proffer of proof, the board of equalization assessed such merchandise in the full sum of \$293,875.

It was further alleged that the plaintiff, before filing its complaint, tendered to the tax-collector of said county the full amount of taxes which it deemed were due, at the rate fixed by the supervisors of said county for the year 1901, but that the said tax-collector refused to accept the same.

The plaintiff prayed that the county of Cochise, and the tax-collector of said county, be enjoined and restrained from collecting or attempting to collect from the plaintiff, for taxes for the year 1901, any sum in excess of that tendered by it,—to wit, the sum of \$14,133.12. The defendants filed a general and certain special demurrers to the complaint, and

an answer in which they specifically denied the acts of misconduct charged in the complaint against the board of equalization in the matter of plaintiff's taxes for the year 1901. The trial court overruled the demurrers, and proceeded to hear the case upon its merits.

The court found that the sum of \$3,150,000, being the valuation placed upon the patented mines of plaintiff and the hoist and other improvements on the patented claim known as the "Holbrook Mine," was wrongfully added by the board of equalization to the assessed valuation of the plaintiff's property for the year 1901, in that the action of the board in thus adding to the valuation of said property was not based upon any information or evidence had or obtained by said board, but was taken arbitrarily and capriciously, and for the purpose of imposing on the plaintiff an unjust measure of the burden of taxation.

The court further found that the action of the board in adding to the assessed valuation of the remaining property of the plaintiff was based upon information and evidence, and was a *bona fide* decision of the questions before said board for consideration.

A decree was entered restraining defendants from collecting or attempting to collect the taxes assessed against plaintiff upon the \$3,150,000 found to have been wrongfully added to the valuation of its property, upon the condition that plaintiff pay the taxes found to be justly and equitably due and owing by plaintiff for the year 1901. From this judgment the defendants have appealed.

The correctness of the court's ruling upon the general demurrer presents the first question for our determination. The cause of action accrued and the complaint was filed before the Revised Statutes of 1901 took effect. Prior to the revision of 1901, the statutes gave no right of appeal from the action of the board of equalization, nor was any other legal remedy afforded by the statutes for the correction of an illegal or fraudulent assessment of property. No other remedy than that which equity afforded was therefore available to the plaintiff for the redress of the wrongs complained of. The limitation upon the powers of a court of equity in the matter of restraining the collection of taxes has been settled for this court in the *State Railroad Tax Cases*, 92 U. S. 575, 23

L. Ed. 663. In this case Mr. Justice Miller laid down this general rule: "In addition to illegality, hardship, or irregularity, the case must be brought within the recognized foundations of equitable jurisdiction, and that mere errors or excess in the valuation, or hardship or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax."

Does the complaint present a case under any recognized head of equitable jurisdiction? An analysis of the complaint will disclose that the purpose of the pleader was to charge the board of equalization, in adding to and increasing the valuation of plaintiff's property for the year 1901, with fraud: (1) In that the said board arbitrarily and capriciously, and with the intent to wrong, defraud, and oppress the plaintiff and to discriminate against it, raised the valuation of its property, without any investigation, and without any evidence as to the cash value of the property assessed; and (2) that the said board of equalization, for the purpose of placing an unfair and undue burden upon the plaintiff, contrary to the custom theretofore prevailing in the county of Cochise and in the territory of assessing patented mines as real estate at five dollars per acre, and notwithstanding that there were a large number of patented mines in said county (not included among those assessed to plaintiff) which were of great value, and known to be such by said board of equalization, the latter, without evidence and without investigation, arbitrarily and capriciously added to the valuation of plaintiff's patented mines in the sum aggregating \$3,150,000; and, further, that plaintiff, in thus being made to pay taxes upon its patented mines, was discriminated against, and made to pay an unjust and unequal burden of taxes, for the further reason that there were within the county of Cochise, at the time the said board raised the valuation of plaintiff's property, a large number of unpatented mining claims of great value which have not been listed by the assessor of the county nor required to be listed by said board of equalization, although said board had full knowledge of the existence of said unpatented mining claims, and that they were of great value. It is a general rule of pleading that, in alleging fraud, the facts which constitute such fraud must be stated.

To characterize an act as "fraudulent" does not, in legal effect, charge it as fraudulent, unless some circumstance or fact be charged which shows in what the fraud consists and how it has been effected. Our revenue laws, in conferring upon boards of equalization power to equalize assessments, and to add to and increase the same, confer a wide discretion upon such boards. This discretion must, however, be a sound one, exercised in good faith, with a view of carrying out the purpose of the law in enforcing equality of taxation and the assessment of property at its cash value. The judgment of such a board must be exercised, not arbitrarily and capriciously, but with due regard to the rights of taxpayers affected to be assessed upon a basis of equality with other property owners. Judge Cooley, in *Merrill v. Humphrey*, 24 Mich. 170, in considering the limitations of the discretionary power of a taxing officer, said: "A discretionary power cannot excuse an officer for refusal to exercise his discretion. His judgment is appealed to, not his resentments, his cupidity, or his malice. He is the instrument of the law to accomplish a particular end through specified means, and, when he purposely steps aside from his duty to inflict a wanton injury, the confidence reposed in him has not disarmed the law of the means of prevention. His judgment may, indeed, be final, if he shall exercise it, but an arbitrary and capricious exertion of official authority, being without law, and done to defeat the purpose of the law, must, like all other wrongs, be subject to the law's correction." Wherever it appears that an assessor or board of equalization has exercised discretion and judgment in assessing property, no matter how erroneous such judgment may be, a court of equity will not disturb the action of such assessor or board. If, however, an excessive valuation of property be made without the exercise of judgment as to the true value of such property, but be made arbitrarily, and for the purposes of oppression and of unfairly adding to the burden of taxation of the owner of such property, such arbitrary action constitutes fraud, against which a court of equity will grant relief. *Andrews v. King County*, 1 Wash. 46, 23 Pac. 409; *Oregon and C. R. R. Co. v. Jackson County*, 38 Or. 589, 64 Pac. 307; *Merrill v. Humphrey*, 24 Mich. 170; *Lefferts v. Board of Supervisors*, 21 Wis. 688. It is to be noted that, in such a case, a fraudulent purpose and

intent on the part of the taxing officers is not enough to justify the interposition of a court of equity. It is the fraudulent overvaluation of the property assessed which is the just ground for complaint.

The charge in the complaint that the board of equalization did, without inquiry or evidence, arbitrarily raise the assessment of plaintiff's property, and that they did this with the design and purpose of forcing plaintiff to pay an unequal and an unfair portion of taxes, without the additional charge of excessive valuation, is an insufficient allegation of legal fraud. The allegation with reference to the assessment of the improvements upon the plaintiff's mines does, in effect, charge overvaluation as to such improvements. The allegations relating to the assessment of the patented mines are open to the criticism that they do not unequivocally state that there was, in fact, an overvaluation of these by the board of equalization. The same is true regarding the allegation relating to the assessment of the stock of merchandise. Plaintiff alleged that, "upon information and belief," the valuation placed by the board of equalization upon the patented mines of plaintiff was, "according to any just known method of arriving at the full cash value of such property, grossly excessive." Why the plaintiff should state in this connection "upon information and belief" does not appear. It is reasonable to suppose that it, better than any one else, would know whether its property was excessively valued by the assessment. Then, again, the phrase "according to any just known method of arriving at the full cash value of such property" is indefinite. The revenue act provides that "all taxable property must be assessed at its full cash value." The term "cash value" is defined by the act to mean "the amount at which the property would be taken in payment of a just debt due from a solvent debtor." The pleader in this instance may have had in mind another method of arriving at the value of property for the purposes of taxation than that pointed out by the statute. These defects in the pleading were not made a ground of special demurrer, and, as there was a positive allegation of overvaluation as to a part of the property affected by the action of the board of equalization, the complaint must be held good upon the general demurrer.

The finding of the trial court that the action of the board of equalization, in adding to the assessed valuation of the patented mines of the plaintiff, was not based upon any information or evidence, and was arbitrary and capricious, and taken for the purpose of imposing an unjust measure of the burden of taxation on plaintiff, was a sufficient finding of fraudulent misconduct on the part of said board to call for the equitable interposition of the court to redress the actual wrong done the plaintiff. The only wrong which the plaintiff could have suffered, under the facts pleaded, was the fraudulent valuation of its property in excess of its cash value. *Pacific Postal Telegraph Co. v. Dalton*, 119 Cal. 604, 51 Pac. 1072; *Lowell v. County Commissioners*, 152 Mass. 372, 25 N. E. 469, 9 L. R. A. 356.

This court has held that both patented and unpatented mining claims are subject to taxation; that patented claims are subject to taxation as real estate, and unpatented mining claims as personal property; and that both classes should be assessed upon the basis of their cash value. *Waller v. Hughes*, 2 Ariz. 114, 11 Pac. 122. There should have been, in addition to the finding of misconduct on the part of the board, some determination of the true cash value of the patented mines, and a finding as to how much was due for taxes on the same, based upon such valuation.

We do not overlook the allegations of the complaint which aver an unjust discrimination against the plaintiff in the assessment of its patented mines at a high valuation while other patented mines in the county, of great value, are alleged to have been assessed upon the valuation of five dollars per acre, and that the trial court may have had this in mind in decreeing that the collection of the taxes levied upon said patented mines of the plaintiff at the valuation placed upon the same by the board should be enjoined, and in decreeing that taxes should only be paid thereon upon the valuation of the same as made by the assessor, which was fixed by the latter at five dollars per acre. Assuming, as the complaint charges, that the assessing officers in Cochise County have intentionally and habitually failed and neglected to assess unpatented mining claims within the county, and during the year 1901 intentionally omitted to assess a large number of patented mining claims at their cash value, but arbitrarily

and capriciously, and for the purpose of placing an unfair and undue burden upon the plaintiff, assessed its patented mines at a high valuation during that year, how far and to what extent is the plaintiff entitled to relief? An examination of the authorities bearing upon this question will disclose that the courts have differed widely as to the character of relief which should be afforded one whose property has been assessed beyond its true value, and an undervaluation of other similar property be shown to have been made by the taxing officers, with the view and purpose of unjustly discriminating against him. Some courts have held that uniformity of taxation requires that the court should grant redress to the extent of restraining the collection of taxes imposed in excess of what would be a fair valuation, having in view the valuation by the taxing officers of similar property. *Randall v. City of Bridgeport*, 63 Conn. 321, 28 Atl. 523; *Ex parte Bridge Co.*, 62 Ark. 461, 36 S. W. 1060; *Board of Supervisors v. Railroad Co.*, 44 Ill. 229; *Walsh v. King*, 74 Mich. 350, 41 N. W. 1080. Other courts have held that only the excess over the statutory requirement as to valuation should be regarded as constituting the wrong to be redressed. *Lowell v. County Commissioners*, 152 Mass. 375, 25 N. E. 469, 9 L. R. A. 356; *Wagoner v. Loomis*, 37 Ohio St. 571; *Central R. R. Co. v. Assessors*, 48 N. J. L. 1, 2 Atl. 789, 57 Am. Rep. 516. A dilemma is presented, no matter what view of the law be taken. If the former rule be adopted, then the statute requiring the assessment of property at its true cash value is violated; if the latter rule be adopted, then the rule requiring uniformity of taxation and the equalization of its burdens is disregarded. The courts generally have been careful to distinguish between what is termed "sporadic" cases of discrimination, and those which are the result of a deliberate plan or system of assessment by taxing officers. Some courts have adopted the first rule only in cases where it is shown that there has been a uniform and general undervaluation of all kinds of property, and the discrimination has been against certain individuals or against a limited class of property. This is understood by us to be the rule applied by the supreme court of the United States in the case of *Cummings v. National Bank*, 101 U. S. 153, 25 L. Ed. 903.

There is much force in the argument that where property generally is undervalued by taxing officers of a state or county, it would be manifestly unjust to disregard such uniform undervaluation in correcting a fraudulent assessment at the suit of a taxpayer whose property is assessed for the purpose of discrimination at a valuation beyond that of other similar property. The argument, however, does not apply where the discrimination is not general, but confined to particular individuals or to a particular class of property. It must be borne in mind that it is the duty of a property-owner to pay a tax upon the basis of valuation as fixed by the law. If others escape, through the evasion by the taxing officers of their duty, it is the maladministration of the law which is at fault, and the case becomes one—common enough—where the citizen who does his full duty is bearing an additional burden by reason of the failure of others to perform their full duty. If the machinery of the law were adequate to require owners of property, subject to taxation, to pay taxes assessed with due regard to the statutory requirement as to valuation, no difficulty would be presented. Obviously, it is impracticable for the courts to require assessing officers to do their full duty in assessing property. The remedy is political rather than legal.

To hold that the court, in redressing a wrongful overvaluation of property, should conform to the valuation which the taxing officers have made upon other similar property, and not to the statutory requirement that all property should be assessed at its full cash value, would result in an additional wrong being done to the owners of property which may not fall within the class in which the discrimination is made. Hence to say that, because it may be the custom, or may be the deliberate plan and system, of the taxing officers in Cochise County or in the territory to tax patented mining claims at five dollars per acre, regardless of their cash value, the patented mines of the plaintiff should be so assessed, would be to disregard the rights of the owners of other species of property to have the burdens of taxation uniformly and equally distributed upon the basis of the cash value of all property subject to taxation.

The findings of the court must cover sufficient of the issues raised by the pleadings to sustain the judgment. Under the

view we take as to the measure of redress in this case, the findings of the trial court are insufficient to sustain the decree. There should have been, in addition to the finding of fraudulent misconduct on the part of the board of equalization, a finding whether in fact the plaintiff's patented mines were overvalued, measured by the statutory rule of valuation; and the decree should have enjoined the collection of only so much of the taxes assessed as were based upon any such overvaluation as may have been thus found.

An inspection of the record shows that some testimony was introduced at the trial as to the cash value of certain of the patented mines, but we find the evidence upon this point too unsatisfactory to warrant us in modifying the decree, or in making any disposition of the case other than the reversal of the judgment and the remanding of the cause for a new trial; and it is so ordered.

Kent, C. J., and Doan, J., concur.

[Civil No. 813. Filed March 20, 1903.]

[71 Pac. 906.]

**JAMES C. GOODWIN, et al., Defendants and Appellants, v.
D. A. TYRRELL, Plaintiff and Appellee.**

1. **CONVEYANCE — DEED — VERBAL AGREEMENT OF SURRENDER.** — Where premises were conveyed in consideration of the execution of certain notes the title to the property vested in the grantees, and a mere subsequent verbal agreement for the surrender of the notes and the deed, not carried into effect by the actual surrender of the deed, does not operate to revert the title in the grantor.
2. **ACTION TO QUIET TITLE — EVIDENCE — MORTGAGE — FORECLOSURE — NECESSARY PARTIES.** — In an action to quiet title evidence that plaintiff was the holder of a sheriff's deed upon foreclosure sale is insufficient to support a judgment in his favor as against defendants in possession and claiming title under a deed executed and recorded prior to the institution of the foreclosure proceedings, where it appears from the record in the foreclosure suit that defendants were not made parties therein. They being indispensable parties, were not bound by the foreclosure.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Edward Kent, Judge. Reversed.

Joseph H. Kibbey, and E. B. Goodwin, for Appellants.

J. J. Whittemore, and W. G. Cooke, for Appellee.

SLOAN, J.—The appellee, D. A. Tyrrell, brought suit in the district court of Maricopa County to quiet his title, as against the Farmers and Merchants' Bank, a corporation, W. J. Kingsbury, J. E. Price, James Goodwin, W. M. Goodwin, Garfield Goodwin, Mary E. Goodwin, and Minnie L. Goodwin, to an undivided one-half interest in forty-five acres of land situate in the northeast quarter of section 22 in township 1 north of range 4 east of the Gila and Salt River base and meridian, Maricopa County. The Farmers and Merchants' Bank filed a disclaimer under the statute. The other defendants entered a general denial to the complaint. William M. Goodwin, Garfield Goodwin, Minnie L. Goodwin, and Mary E. Goodwin further answered that they were the owners in fee simple of the premises in controversy, and further pleaded that they and their immediate grantors—to wit, J. C. Goodwin and R. G. Goodwin—had ever since the fourteenth day of September, 1892, been in the continuous, quiet, open, notorious, peaceable, and adverse possession of the premises, and had paid the taxes thereon, and made lasting and valuable improvements thereon. They asked that their title to the property in question be quieted, and the plaintiff enjoined from asserting any right or title thereto, or interest therein, or in and to any part thereof. The trial court found Tyrrell to be the owner in fee and entitled to the possession of the interest in the land and premises described in his complaint; and, second, that the allegations of his complaint were true, and the denials and allegations of the defendants' answer untrue. The judgment of the court, in accordance with the findings, decreed Tyrrell to be the owner in fee and entitled to the possession of the premises, and perpetually enjoined the defendants from asserting any claim or title thereto adverse to Tyrrell.

The record discloses that in 1892 one Ben Goldman was the owner of the premises in controversy; that during that year he

conveyed the same to J. C. Goodwin and R. G. Goodwin by warranty deed; that this deed was not placed of record until some time during the year 1895; that during the year 1893 Goldman borrowed money of the appellee, Tyrrell, and, to secure the payment of the same, executed a mortgage on the premises in controversy, which mortgage was placed of record upon the date of its execution. The record further discloses that Tyrrell in 1895 brought suit in the district court of Maricopa County to foreclose his mortgage against Goldman, the mortgagor, as the sole defendant; that, under an execution and order of sale issued under the judgment of foreclosure obtained in said suit, the premises were sold on the tenth day of December, 1895, by the sheriff of the county, at which sale the appellee became the purchaser; that on the third day of July, 1896, Tyrrell obtained a sheriff's deed to the premises, as the purchaser under said foreclosure sale.

Upon the trial of the action the appellee, to sustain the allegations of his complaint, offered in evidence the mortgage executed by Goldman to himself as mortgagee, the record of the foreclosure suit, and the sheriff's deed to himself as grantee under the sale made by virtue of the execution and order of sale under the judgment of foreclosure. This evidence was objected to by the appellants upon the ground that they had not been made parties in the foreclosure suit, and hence were not bound by it, nor their interest affected by it, nor by the sheriff's deed, which depended for its validity upon the regularity of the foreclosure proceedings. No other evidence was offered by the appellee in support of his title. The appellants put in evidence their deed from Goldman, dated September 14, 1892, and recorded the sixth day of May, 1895. In addition they introduced evidence showing possession by them of the premises in controversy since 1892. The appellee introduced in evidence the deposition of Goldman, to the effect that, after the execution and delivery of the deed to J. C. and R. G. Goodwin, he entered into a verbal agreement with the Goodwins that he should surrender the notes given him by the latter in payment of the land, and that they should return and surrender the deed to him; that under the terms of the agreement he did return the notes, but that the Goodwins failed and neglected to surrender and deliver up the deed. The Goodwins denied that any such agreement had been made

or entered into, and further denied that the notes had ever been surrendered by Goldman to them, but admitted that the latter had never been paid. With the exception of testimony put in by the appellants to sustain their plea of the statute of limitations, no other evidence was introduced by either of the parties upon the trial.

The appellants assign as error that the finding of the court that the appellee was the owner in fee of the premises in controversy is not sustained by the evidence in the case, and is contrary to law, because based upon evidence which shows that the appellants are the legal owners of the premises, and that their title was not affected by the foreclosure proceedings, and the conveyance by the sheriff under these proceedings; the appellants not having been made parties defendant in said proceedings, and their deed from Goldman at the time of the institution of said foreclosure proceedings being of record, and imparting constructive notice of their interest and right of redemption. We think this assignment of error well taken. There can be no doubt, assuming Goldman's testimony to be true, that the conveyance to the Goodwins operated at the date of the same to convey all the right, title, and interest which Goldman had at the time in the premises. Any subsequent verbal agreement looking to the surrender of this deed that was not carried into effect was ineffective to reconvey to Goldman the interest held by the Goodwins. At the time of the institution of the foreclosure suit by Tyrrell the deed to the Goodwins was of record, and Tyrrell was bound to take notice of the right of redemption held by them as the successor in interest of the mortgagor. The law is settled that the owner of the premises at the time of the institution of the suit in foreclosure is an indispensable party thereto, and, unless made a party, is not bound by any judgment which may be rendered thereon. The rights, therefore, of the Goodwins, were in no way affected by the foreclosure sale and the deed executed by the sheriff thereunder. The title obtained by Tyrrell through such foreclosure sale and deed was not sufficient to sustain a judgment quieting his title as against the Goodwins. Their equity of redemption, conceding that the mortgage from Goldman to Tyrrell was prior in right to the conveyance from Goldman to the Goodwins, because of the failure of the latter to record the same until after the execu-

tion of the mortgage, has never been foreclosed. Their rights remain the same as though no foreclosure had ever been had under the Tyrrell mortgage.

We think the judgment should have been for the defendants in this case, dismissing the action. The proof on the part of the defendants under their answer was not sufficient to entitle them to a decree quieting their title as against the appellee. Unless barred by the statute of limitations, Tyrrell still has a right to foreclose as against the appellants.

The judgment of the court below is therefore ordered reversed, and the cause remanded to the district court, with instructions to enter its judgment against the appellee and in favor of the appellants, dismissing the action, and for costs.

Doan, J., and Davis, J., concur.

On petition for rehearing, 72 Pac. 681.

THE COURT.—The judgment heretofore rendered by this court reversing the judgment of the district court and remanding the cause, "with instructions to the district court to enter its judgment against the appellee and in favor of the appellants, dismissing the action," will be modified so as to read that the judgment of the court below is reversed and the cause remanded for a new trial.

[Civil No. 786. Filed March 20, 1903.]

[71 Pac. 908.]

MARICOPA COUNTY, Defendant and Appellant, v. J. M. BURNETT, Plaintiff and Appellee.

1. JUSTICE OF THE PEACE—FEES—CRIMINAL CASES—LOCAL AND SPECIAL LEGISLATION—CONSTITUTIONAL LAW—HARRISON ACT (24 STATS. 170,—ORGANIC ACT, REV. STATS. 1901, PAR. 63) CITED—REV. STATS. 1901, PEN. CODE, SEC. 1183, HELD VOID.—The "Harrison Act," *supra*, provides that "The legislatures of the territories of the United States . . . shall not pass local or special laws . . . regulating the jurisdiction and duties of justices of the peace." Section 1183, *supra*, reads: "No justice of the peace . . . residing and holding his court at the county seat . . . shall receive or collect

from the county any fees or compensation in any criminal case unless the warrant of arrest was issued in such case by and with the advice of the district attorney." *Held*, that when, as in this instance, the object aimed at by the statute is broad enough to cover the class excluded as well as the class included within its operation, mere convenience or expediency is not sufficient to form the basis of classification, and therefore the latter act, *supra*, is special and local legislation, and void, because in conflict with the provisions of the "Harrison Act," *supra*.

2. COURTS—JUDICIAL NOTICE—COUNTY SEATS—NOT NECESSARILY LARGEST TOWNS.—The court takes judicial notice of the fact that all the county seats of the territory are not situated in the largest towns and centers of population.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Affirmed.

The facts are stated in the opinion.

A. J. Edwards, and Oliver P. Morton, for Appellant.

Baker & Bennett, for Appellee.

That the classification attempted to be made in this case is improper and the act unconstitutional, see *Safety Building Loan Co. v. Ecklarr*, 106 Ky. 115, 50 S. W. 50; *Richards v. Hammer*, 42 N. J. L. 435; *State v. Spaude*, 37 Minn. 322, 34 N. W. 165; *Codlin v. Kohlhousen*, 9 N. M. 565, 58 Pac. 501; *People v. Knopf*, 183 Ill. 410, 56 N. E. 155; *City of Tulare v. Hevren*, 126 Cal. 226, 58 Pac. 530; *State v. Philbrick*, 50 N. J. L. 581, 15 Atl. 579.

SLOAN, J.—The appellee, J. M. Burnett, a justice of the peace in and for Phoenix Precinct, Maricopa County, presented for allowance to the board of supervisors of said county his claim for fees earned as such justice of the peace for the months of July, August, and September, 1901, amounting to the sum of \$366.15. The board of supervisors refused to allow certain items amounting to ten dollars, upon the ground that these items were for fees in criminal cases in which the warrants were issued without the advice of the district attorney of the county. Burnett refused to accept the amount

allowed by the board, and brought suit in the district court against the county to recover the full amount of his claim. The trial court gave him judgment for the full amount, from which judgment the county has appealed.

The case is brought avowedly for the purpose of testing the validity of section 1183 of the Penal Code, which reads: "No justice of the peace, police magistrate or recorder, residing and holding his court at the county seat of any county, shall receive or collect from the county any fees or compensation in any criminal case unless the warrant of arrest was issued in such case by and with the advice of the district attorney." The trial court held this provision of the statute to be invalid, for the reason that it was in violation of that part of the Organic Law of the territory known as the "Harrison Act," in that it was local and special legislation. The particular sections of the Harrison Act claimed to be violated by the legislative act quoted read as follows: "The legislatures of the territories of the United States . . . shall not pass local or special laws in any of the following enumerated cases: . . . Regulating the practice in courts of justice; regulating the jurisdiction and duties of justices of the peace." Act July 30, 1886, 24 Stats. 170. It is argued that the legislative act denying any compensation to justices of the peace having their offices at the county seats in the various counties, or any right to compensation, for services rendered in criminal causes unless the warrants of arrest in such causes be issued by and with the consent of the district attorneys of said counties, is local, in that it differentiates justices having their offices at said county seats from other justices having their offices elsewhere in the various counties. It is also argued that the act in question is special, in that it applies to particular officers to the exclusion of others. It is obvious that the effect of the act is to regulate the practice, even if it does not regulate the jurisdiction, in certain courts of justice. The intent of the act obviously was to require the advice and consent of the district attorneys before criminal causes should be instituted in these courts. The issuance of a warrant by the justice having his office at the county seat without the advice of the district attorney is not in terms prohibited. The jurisdiction of such a justice in such a case remains unaffected by the act. If the act, however, be

valid, such justice might decline to issue his warrant in such a case without violating his duty, for the statute would undoubtedly protect him were he to refuse to issue a warrant which did not have the approval of the district attorney of the county. It is not a case of the officer assuming an office, certain duties appertaining to which are required by the law to be performed without compensation. A law resting upon some necessary distinction or difference which naturally segregates one class of persons or things from another class of persons or things may be made to apply to such class to the exclusion of another, and yet be general, and not special, in its operation. It is only where a general law can be made applicable so as to effect the purpose such law has in view, that special laws are inhibited by the Organic Act. Thus it has been repeatedly held under constitutional limitations akin to the Harrison Act that a law may be made applicable to a certain class of municipal corporations to the exclusion of others, providing the class be one based upon some difference in situation and circumstance suggesting the necessity of such classification, and providing further that in such classification provision be made so as not to restrict the operation of the act to existing municipalities to the exclusion of others which in the future may come within such classification.

It is argued that such a classification is made in the present case, for the reason that county seats of the territory are for the most part centers of population, in which the major portion of the criminal business of the territory is instituted; that the district attorneys are by law required to hold their offices at such county seats; that it is expedient that such prosecutions be under the direction and control of the district attorneys in the interest of economy; that without this restriction many unnecessary and frivolous prosecutions would otherwise be brought, and the burden of the expense of such prosecutions unnecessarily be added to the people of the territory. It is further argued that county seats are not necessarily permanent, but may be changed at the will of the people, under the restrictions of the law governing such changes; and that, therefore, the classification is not one which necessarily pertains to certain precincts to the exclusion, in the future, of others. It is true that in a majority of the

counties the county seats are situated in the largest towns and centers of population. This, however, is not true of all the counties in the territory. The court takes judicial knowledge of this fact. It seems clear that in this statute the legislative policy was to restrict criminal prosecutions, in so far as practicable, to cases which would have the sanction and approval of the public prosecutors of the counties. Inasmuch as it would be obviously impracticable to obtain the sanction and approval of the district attorneys in cases brought in precincts remote from the county seats where such district attorneys have their offices, the act was so framed as to be applicable only to precincts situated at such county seats. The matter of the extent of business in, and the relative size and population of, such county seats probably did not enter into the legislative reason for such classification. Certainly no reason can be suggested why a warrant of arrest should not be issued, without the consent of the district attorney, by a justice at a county seat, which does not equally apply to the issuance of warrants by other justices. The restriction is obviously one made in the interest of economy in preventing frivolous cases being brought and the fees of the justices unnecessarily increased. The purpose of the act is, undoubtedly, commendable, but its restriction to certain precincts, to the exclusion of others, does not appear to be justified, even upon the ground of expediency. When, as in this instance, the object aimed at by the statute is broad enough to cover the class excluded as well as the class included within its operation, mere convenience or expediency is not enough, as we view it, to justify such classification. In the nature of things, a general statute of this character could be made applicable to all precincts of a county. The result might be prejudicial to the due enforcement of the criminal law. Still the statute as it exists might result in the same way. The district attorney might be absent when needed, or decline to give his approval to meritorious prosecutions. The expediency suggested, therefore, seems an insufficient reason for sustaining the validity of the act, and to take it out of the class of special legislation forbidden by the Organic Law.

The judgment of the district court is affirmed.

Doan, J., and Davis, J., concur.

[Civil No. 803. Filed March 20, 1903.]

[71 Pac. 903.]

LOUISA J. SANFORD et al., Defendants and Appellants, v.
CITY OF TUCSON, Plaintiff and Appellee.

1. EMINENT DOMAIN—POWER OF TERRITORY—REV. STATS. U. S., SEC. 1851, (ORGANIC ACT, REV. STATS. ARIZ. 1901, PAR. 15,) CITED—OUREY v. GODDWIN, 3 ARIZ. 255, 26 PAC. 376, FOLLOWED.—The territory of Arizona, though not possessing sovereignty, is clothed with authority to provide for the exercise of the power of eminent domain by section 1851, *supra*, providing that "The legislative power of this territory extends to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States."
2. SAME—LOCAL OR SPECIAL LAWS—CONSTITUTIONAL LAW—"HARRISON ACT"—1 SUPP. REV. STATS. U. S., P. 503, (ORGANIC ACT REV. STATS. ARIZ. 1901, PAR. 63) CITED—LAWS ARIZ. 1897, P. 97, NO. 57, CONSTRUED AND HELD CONSTITUTIONAL.—The "Harrison Act," *supra*, prohibits the territorial legislature from passing local or special laws incorporating cities, towns, or villages, or changing or amending the charter of any town or city. Act No. 57, *supra*, entitled "An act adding to the powers and privileges already vested by charter in incorporated cities," confers upon such cities the power "to lay out and establish, . . . pave or otherwise improve streets, alleys," and further authorizes such cities to proceed, wherever necessary, under the Eminent Domain Act of the territory to condemn private property for such purposes. *Held*, that said act No. 57 is neither local nor special, but confers equal powers and privileges upon all existing cities and such as might be incorporated in the future, and therefore is not in conflict with the provisions of the "Harrison Act," *supra*.
3. SAME—PLEADING—COMPLAINT—DEMURRER—ISSUES RAISED—LAWS ARIZ. 1897, ACT NO. 57, P. 97, CITED—"HARRISON ACT"—1 SUPP. REV. STATS. U. S., P. 503, (ORGANIC ACT, REV. STATS. ARIZ. 1901, PAR. 63,) CITED.—Where a complaint in an action by a city to condemn land to widen a street set forth that the cost, damages, and expenses to be incurred under the ordinance authorizing the improvement were to be defrayed by special assessment upon the property to be benefited by the improvement, and not to be paid by the city, a demurrer thereto does not raise the question whether in making such improvement the city is in a situation to avail itself of the power of eminent domain under act No. 57, *supra*, without violating the provision of the "Harrison Act," *supra*, which prohibits cities from becoming indebted to an amount exceeding four per centum on the value of their taxable property, nor does such inability militate against the validity of the act itself.

4. **SAME—PUBLIC USE—QUESTION OF LAW.**—What constitutes a public use is a question of law.
5. **SAME—SAME—NECESSITY—QUESTION OF FACT—TO BE DECIDED BY THE COURT.**—What constitutes a necessity to authorize the taking of private property for a public use, is a question of fact, but one nevertheless to be decided by the court, and not the jury.
6. **SAME — PLEADING — COMPLAINT — MUST SHOW PLAINTIFF'S RIGHT—NECESSITY—REV. STATS. ARIZ. 1901, PARS. 2451, 2454, CONSTRUED.**—Paragraph 2451, *supra*, provides that, before property can be taken in condemnation, it must appear that the use to which it is to be applied is a use authorized by law, and that the taking is necessary to such use. In paragraph 2454, *supra*, it is provided that the complaint in condemnation must contain certain averments; among others, "a statement of the right of the plaintiff." *Held*, that as the necessity for the taking is the basis for the exercise of the right, and as the statute requires the complaint to contain a statement of plaintiff's right, a complaint by a city seeking to condemn land to widen a street which does not aver nor show by the ordinance set forth therein that the taking is necessary is insufficient and subject to demurrer.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. George R. Davis, Judge. Reversed.

The facts are stated in the opinion.

Owen T. Rouse, and Durelle F. Glidden, for Appellants.

Eminent domain is inherent in the federal government and in the several states by virtue of their *sovereignty*. Lewis on Eminent Domain, 317; *Kohl v. United States*, 91 U. S. 367, 23 L. Ed. 449.

Being an attribute of sovereignty, the power of eminent domain does not inhere in a territorial government. *Newcomb v. Smith*, 1 Chand. (Wis.) 71; *Pratt v. Brown*, 3 Wis. 603.

The taking being in derogation of the property rights of the citizens, the authority to take the property must not be implied or inferred, but must be given in express language. *Schmidt v. Densmore*, 42 Mo. 225; *Illinois Cent. R. R. Co. v. Chicago*, 138 Ill. 453, 28 N. E. 740; *Cogswell v. New York etc. Ry. Co.*, 103 N. Y. 10, 57 Am. Rep. 701, 8 N. E. 537.

If there remains a doubt as to the extent of the power, such doubt will be resolved adversely to the claim. *New York etc. Ry. Co. v. Kip*, 46 N. Y. 546, 7 Am. Rep. 385; *Pueblo etc. Ry. Co. v. Rudd*, 5 Colo. 270.

Every jurisdictional step must be strictly followed. *Detroit Sharpshooters v. Highway Commrs.*, 34 Mich. 36; *Anderson v. Pemberton*, 89 Mo. 61, 1 S. W. 216; *Kroop v. Foreman*, 31 Mich. 144.

The burden is on the city to show strict compliance. Necessity must be shown. *Manistee R. R. Co. v. Fowler*, 73 Mich. 217, 41 N. W. 261; *Tehama County v. Bryan*, 68 Cal. 37, 8 Pac. 673.

Roscoe Dale, City Attorney, and Rochester Ford, for Appellee.

SLOAN, J.—The city of Tucson brought this action in the district court of Pima County to condemn property of the appellee known as "Block 207," in said city, for the purpose of widening Congress Street, in said city.

The complaint in the action contained the following averments: "(1) That it is a municipal corporation, organized and existing under the laws of the territory of Arizona; that the defendants S. H. Drachman Cigar Company, a corporation, and Julius Goldbaum, Incorporated, are corporations organized under the laws of Arizona, and doing business in the city of Tucson, Arizona; that defendants Louisa J. Sanford and Don A. Sanford, her husband, are residents of the city of Washington, District of Columbia, and that all the other defendants are residents of Tucson, Arizona. (2) That the defendant Louisa J. Sanford is the owner of all that certain body of land in the city of Tucson, Arizona, known as 'Block 207,' in said city, according to the official field-notes and survey thereof, which said block consists of lots 1, 2, and 3, described as follows, to wit: Lot 1: 'Beginning at the northeast corner of lot, run thence south, 81.4 degrees east, 11.88 feet; thence south, 83½ degrees west, 118.14 feet; thence north, 81.4 degrees west, 22.44 feet; thence north, 88¼ degrees east, 118.14 feet, to place of beginning.' Lot 2: 'Beginning at northeast corner of lot, run thence south, 81.4 degrees east, 22.44 feet; thence south 83½

degrees west, 48.84 feet; thence north, 81.4 degrees west, 26.4 feet; thence north, $81\frac{1}{4}$ degrees east, 48.84 feet, to place of beginning.' Lot 3: 'Beginning at northeast corner of lot, run thence south, $81\frac{1}{4}$ degrees east, 26.4 feet; thence south, $83\frac{1}{2}$ degrees west, 95.04 feet; thence north, 7 degrees west, 34.98 feet; thence north, $88\frac{1}{4}$ degrees west, 95.04 feet, to place of beginning.' That defendants S. H. Drachman Cigar Company, a corporation, John F. Hansen, Joseph Krause, G. K. Smith, A. Felix, Julius Goldbaum, Incorporated, a corporation, John Doe, and Richard Roe, are in occupation of, and claim an interest as lessees or occupants in, parts of the said block 207. That, therefore, to wit, on the third day of May, 1901, the mayor and common council of the city of the said city of Tucson passed an ordinance entitled 'Ordinance No. 149, providing for widening Congress Street, between Stone Avenue and Church Street, in the city of Tucson, Arizona,' by which it was ordained that Congress Street, between Stone Avenue and Church Street, in said city, be opened and widened so as to include all of the land now lying in block 207 in said city of Tucson bounded on the east by Stone Avenue, on the south by Congress Street, and on the north by Maiden Lane, to the end that the legal right and title to remove the improvements on the aforesaid premises, and to use, occupy, and enjoy the said premises as a public street, shall vest in the said city of Tucson; and the said ordinance further provided that all the costs, damages, and expenses incurred in carrying out the provisions of said ordinance shall be defrayed by special assessment upon the several lots, blocks, tracts, and parcels of land in the city of Tucson to be benefited by said improvements; and that before said improvements are made, or ordered made, and before the said ordinance was passed, a petition for the making of said improvements, signed by owners of a majority of the lineal feet fronting upon said improvements, was first filed with the city recorder of said city of Tucson. Plaintiff further alleges that the property hereinbefore described embraces all the land within the limits of said block 207 in said city of Tucson, Arizona. Wherefore plaintiff prays that the improvements on and an easement in all of the said property hereinbefore described be condemned for the public use aforesaid, and prays for all proper orders in the premises."

To this complaint the appellant filed a demurrer upon the following grounds as alleged: "(1) That the complaint does not contain a statement of facts sufficient to constitute a cause of action against said defendants, or either of them. (2) That the facts alleged in the complaint show that the plaintiff is a municipal corporation, organized under and by virtue of the acts of the legislative assembly of the territory of Arizona, and by no other authority. (3) That this action is a proceeding to condemn private property for an alleged public use under the right of eminent domain, when no such right exists in the territory of Arizona, and the legislative assembly thereof had no power to authorize such right on behalf of the territory of Arizona, or to grant any such power or authority to any municipal corporation created by the legislative assembly of said territory, but such power and right alone exists in the government of the United States as the sovereign. (4) That the facts alleged in the complaint show that the purpose of the action is to take private property for public use, viz. block 207 of the city of Tucson, which is alleged to be the private property of Mrs. Louisa J. Sanford. That the so-called ordinance of the city of Tucson under which the proceeding is had, and on which plaintiff's right of action is based, is an ordinance for the improvement of a street, and not for the condemnation of private property for public use. (5) That said ordinance is void, in this: that by it provisions were attempted to be made for the condemnation of private property and the taking of it for an alleged public use, at the cost of the owners of other private property, under special assessment. (6) That there is no authority vested in the city of Tucson to take private property for a public use, and to assess the value thereof, or any part of the value of such property, to other property-holders under special assessment, or at all. (7) That said ordinance is void, and is in conflict with the laws of the territory of Arizona; that it is void for further reason that it is indefinite and uncertain as to the property and persons affected, and there is no provision thereof by which it can be determined what property and what persons are to be affected by it. (8) That neither by the ordinance referred to in the complaint nor the laws of the territory of Arizona are there provisions for the payment of due compensation to

the defendant for her said property. (9) That the facts stated in the complaint are not sufficient to warrant any judgment under the law in favor of plaintiff." The demurrer was by the court overruled.

In the absence of a bill of exceptions or statement of facts, the correctness of the court's ruling upon the demurrer presents the only question for our consideration. Counsel for appellant contend that the demurrer should have been sustained for the reason that no right of eminent domain exists in the territory. Upon this point it is sufficient to say that this court, in the case of *Oury v. Goodwin*, 3 Ariz. 255, 26 Pac. 376, decided that the territory of Arizona, though not possessing sovereignty, is clothed with authority to provide for the exercise of the power of eminent domain by the clause in the Organic Act which says: "The legislative power of this territory extends to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States."

It is further contended by counsel for appellant that, conceding the right of eminent domain to exist in the territory, the legislature has not conferred upon the city of Tucson power to exercise such right in the manner nor for the purpose sought in this action. The city of Tucson was incorporated by special charter granted by the legislature. An examination of this charter discloses that it conferred no power or authority to condemn property for municipal purposes. The legislature, in March, 1897, passed an act entitled "An act adding to the powers and privileges already vested by charter in incorporated cities." Laws 1897, p. 97, No. 57. This act was general in its character, and applied alike to all incorporated cities in the territory. Among other things, it conferred upon such cities the power "to lay out and establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, parks and public grounds, and vacate the same." Other provisions of the act set forth the conditions and limitations under which such improvements should be made, and authorized such cities to proceed, wherever necessary, under the Eminent Domain Act of the territory, to condemn private property for such improvements. It is contended by counsel for appellant that the act of March 18, 1897, is in conflict with that

part of the Organic Law known as the "Harrison Act," in that it was an attempt to change or amend the charter of the city of Tucson by a local or special law. The Harrison Act prohibited the legislature from passing local or special laws incorporating cities, towns, or villages, or changing or amending the charter of any town, city, or village. In no proper sense can the act of the legislature above referred to be considered either local or special. It applied to all cities in the territory alike, and did not refer, either in terms or by implication, to the city of Tucson in any special way; on the contrary, it conferred equal powers and privileges upon all other existing cities of the territory, and such as might be incorporated in the future.

Whether the city of Tucson is in a situation to avail itself of the power of eminent domain under the act without violating another provision of the Harrison Act prohibiting municipal corporations from "becoming indebted in any manner or for any purpose to any amount in the aggregate, excluding existing indebtedness, exceeding four per centum on the value of its taxable property within such corporation," is a question which does not militate against the validity of the act itself, nor does the demurrer raise the latter question, inasmuch as the complaint set forth that the cost, damages, and expenses to be incurred under the ordinance authorizing the improvement were not to be paid by the city, but, as authorized by the act of March 18, 1897, were to be defrayed by special assessment upon the property to be benefited by the improvement.

Counsel for appellant further contend that the complaint was insufficient in that it did not set forth that the improvement contemplated was a public use, and that there existed a necessity for the taking of the property sought to be condemned. What constitutes a public use is a question of law. The legislature, in the act quoted, specifically recognized the improvement of a street for the benefit of the public and for the betterment of its means of travel and transportation to be such a use. The question of the necessity for the taking of property for such use is one of fact. Paragraph 2451 of the Revised Statutes of 1901 provides that, before property can be taken in condemnation, it must appear that the use to which it is to be applied is a use authorized by law, and that the taking is necessary to such use. In paragraph 2454, *Id.*,

it is provided that the complaint in condemnation must contain certain averments; among others, "a statement of the right of the plaintiff." Other provisions of the statute on eminent domain make it clear that, while the necessity for the taking of the property in any case is a question of fact, it is one to be determined by the court, and not the jury. As the necessity for the taking is the basis for the exercise of the right, and as the statute requires the complaint to contain a statement of plaintiff's right, it follows that it must contain some averment showing a necessity for the taking of the property sought to be condemned.

The supreme court of Montana, in the case of the *City of Helena v. Harvey*, 6 Mont. 114, 9 Pac. 903—a case analogous to the one at bar—said: "The law expressly requires that, before the district court can condemn property for public use, the right to do so must appear and be stated in the complaint. When required to be alleged, it must be proved, unless admitted. By providing that the right to take property for public use is founded upon a use authorized by law, and that the use for such purpose is necessary, the law itself recognizes the fact that a mere taking for a use authorized by law is not conclusive that the taking is necessary for such use. The district court was asked to condemn this property. It could only do so when the requirements of the law authorizing such condemnation were complied with. This was not done until the necessity for the use was averred and proved." The complaint in this case contained no averment that the taking of appellant's property was necessary or required for street purposes. The ordinance of the city set up in the complaint in the action contained no finding that the public use required the condemnation of appellant's property. Had the ordinance contained such finding, there is authority to sustain the proposition that the recital of such ordinance and such finding would be sufficient allegation of the necessity of the taking without further averment in that behalf. *City of Los Angeles v. Waldron*, 65 Cal. 283, 3 Pac. 890. The demurrer should, therefore, have been sustained to the complaint upon this ground.

Judgment of the court below is reversed, and the cause remanded for further proceedings.

Kent, C. J., and Doan, J., concur.

[Civil No. 775. Filed March 20, 1903.]

[71 Pac. 940.]

L. C. SHATTUCK, Plaintiff and Appellant, v. MARTIN
COSTELLO, Defendant and Appellee.

1. **APPEAL AND ERROR—BOND—TIME OF FILING—JURISDICTION.**—Where the record discloses that an appeal-bond was not filed within twenty days after the term at which judgment was rendered, the supreme court has no jurisdiction, and the appeal must be dismissed, even though the defect was not called to the court's attention until on rehearing.

On rehearing. Appeal dismissed.

For former opinion, see *ante*, p. 22, 68 Pac. 529.

Barnes & Martin, for Appellant.

James Reilly, and Herring & Mitchell, for Appellee.

THE COURT.—This cause was heard and decided at the January, 1901, term of this court. A rehearing was granted at a subsequent term. Upon the reargument, counsel for appellee for the first time called the attention of the court to the record, which discloses that the appeal-bond was not filed within the statutory period of twenty days after the term at which the judgment was rendered. An examination of the record shows the objection to be well taken. The appeal-bond was filed October 27, 1901—more than twenty days after the adjournment of the term at which the judgment was rendered. This court, therefore, is without jurisdiction.

The delay in calling the court's attention to this matter is inexcusable, and, did the law permit, this court would be justified, under the circumstances, in regarding the delay as a waiver of the objection. This court, however, has repeatedly held that the filing of an appeal-bond within the time limited by the statutes is a jurisdictional requisite of an appeal. *Putnam v. Putnam*, 3 Ariz. 182, 24 Pac. 320; *Ruff v. Hand*, 3 Ariz. 175, 24 Pac. 257. We have no discretion in the matter, but must dismiss the appeal, and it is so ordered.

[Civil No. 788. Filed March 20, 1903.]

[71 Pac. 906.]

LOUISA J. SANFORD, Petitioner, v. THE DISTRICT COURT in and for Pima County, and the HON. GEORGE R. DAVIS, Judge of said Court, Respondents.

1. PROHIBITION—WHEN ISSUED—NOT TO CORRECT ERROR—TO PREVENT USURPATION OF JURISDICTION—APPEAL.—Prohibition will not issue to prevent the enforcement of a judgment of a district court in condemnation proceedings, the right of eminent domain existing, and the court having jurisdiction of the suit, because of an erroneous ruling upon the sufficiency of the complaint not affecting the question of jurisdiction, as the function of the writ is to prevent a usurpation of jurisdiction, and not to secure the correction of errors, which may be remedied by an appeal.
2. SAME—SAME—REMEDY—INEFFECTUAL—WILL NOT ISSUE.—A writ of prohibition will not issue where it appears that the court has already done the thing sought to be prevented, and the remedy would therefore be ineffectual.

ORIGINAL APPLICATION for a Writ of Prohibition.
Denied.

Owen T. Rouse, and Durrelle F. Glidden, for Petitioner.

Dale & Campbell, and Webster Street, for Respondents.

“A writ of prohibition is never issued unless it clearly appears that the inferior court is about to exceed its jurisdiction.” *Smith v. Whitney*, 116 U. S. 167, 6 Sup. Ct. 570, 29 L. Ed. 601; *Crowned King Mining Co. v. District Court*, 7 Ariz. 263, 64 Pac. 439; *State v. Rombauer*, 99 Mo. 221, 12 S. W. 661; *Blade v. Superior Court Fresno County*, 60 Cal. 290.

“Where there is another legal remedy, by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful or depends on facts which are not made matter of record, the granting or refusal of the writ is discretionary. Nor is the writ obligatory where the case has gone to judgment and the want of jurisdiction does not appear on the face of the proceedings.” *Ex parte Cooper*, 143 U. S. 472,

12 Sup. Ct. 453, 36 L. Ed. 232; *In re Rice*, 155 U. S. 396, 15 Sup. Ct. 149, 39 L. Ed. 198; *In re Aliz*, 166 U. S. 136, 17 Sup. Ct. 522, 41 L. Ed. 948.

The writ of prohibition cannot be made to perform the office of a writ of error. *Ex parte Ferry Co.*, 104 U. S. 519, 26 L. Ed. 815, and cases cited *supra*.

A writ of prohibition is one which commands a person not to do a certain thing; it calls for no affirmative act, but merely suspends all action. If the thing is done a writ of prohibition cannot undo it. *United States v. Hoffman*, 4 Wall. 158, 18 L. Ed. 354.

SLOAN, J.—In this case Louisa J. Sanford has brought an original action in this court to obtain a writ of prohibition directed to the district court of Pima County and the judge thereof to prevent the enforcement of a judgment rendered by said court in a suit wherein the city of Tucson was plaintiff and the said Louisa J. Sanford one of the defendants, condemning property of the latter for street purposes. From this judgment an appeal was taken to this court, which has been heard and determined at this term. *Ante*, p. 247, 71 Pac. 903. The judgment was reversed upon the ground that the complaint omitted to contain the necessary allegation that the taking of the property sought to be condemned was necessary for the enjoyment of a public use.

It appears that when this action was brought the case had gone to judgment, and the city of Tucson had, under the order of the district court, taken possession of the property condemned. A writ of prohibition cannot be made to perform the functions of an appeal. Its object is to prevent a usurpation of jurisdiction, and not the correction of errors. Accordingly, it has been held that the writ will not issue in a case where the trial court was proceeding in an equitable proceeding in which the bill omitted to state necessary averments of fact. *Ex parte Greene*, 29 Ala. 52. We held, on the appeal, that the city of Tucson possesses the right of eminent domain under the territorial statutes, and may exercise that right for purposes of street improvement, and that the district court has jurisdiction of a suit brought for the enforcement of this right. The judgment was reversed because of an erroneous ruling, which did not affect the question

of the jurisdiction of the court over the subject-matter of the action.

Again, as said by the supreme court in *United States v. Hoffman*, 4 Wall. 158, 18 L. Ed. 354, "The writ of prohibition, as its name imports, is one which commands the person to whom it is directed not to do something which, by the suggestion of the relator, the court is informed he is about to do. If the thing be already done, it is manifest that the writ cannot undo it." As we have said, the court, at the time of the bringing of this action, had rendered its judgment, and had let the city into possession, and had, therefore, done all that it could do in the premises. The prevention of any further proceedings by the trial court would, therefore, afford plaintiff no relief.

For these reasons the peremptory writ is denied at the cost of plaintiff.

Kent, C. J., and Doan, J., concur.

[Civil No. 796. Filed March 20, 1903.]

[71 Pac. 924.]

JOSEPH CURTIS et al., Defendants and Appellants, v.
BOQUILLAS LAND AND CATTLE COMPANY, a
Corporation, Plaintiff and Appellee.

1. **APPEAL AND ERROR—RECORD—ABBREVIATED BY STIPULATION—EVIDENCE IN RECORD—NOT PRESUMED TO BE ALL THAT WAS INTRODUCED.**—Where, by stipulation, the record on appeal was restricted to certain papers, there being no bill of exceptions and no statement of facts or transcript of the evidence, and the judgment recites that witnesses were sworn and testified in behalf of the respective parties, and documentary evidence was introduced and filed, it cannot be assumed that the exhibits and the written stipulation contained in the record constitute all the evidence which the trial court had before it in rendering its judgment.
2. **SAME—SAME—SAME—QUESTION PRESENTED.**—Where, by stipulation, an abbreviated record was presented on appeal, which was restricted to the judgment-roll, the motion for a new trial and the ruling thereon, a written stipulation as to a part of the evi-

dence of the defendants in the action, certain exhibits, bond on appeal, assignment of errors, and an admission that plaintiff, a corporation, was authorized to do business in the territory, such record presents no matter for the consideration of the appellate court, except the one question, whether the pleadings support the judgment.

3. EJECTMENT—FINDINGS—SUFFICIENCY—REV. STATS. ARIZ. 1887, PAR. 3139, CITED.—In an action of ejectment under the statute, *supra*, providing that "It shall be sufficient to entitle the plaintiff to recover to show, at the time the action was commenced, the defendant was in possession of the premises claimed, and that the plaintiff had a right to the possession thereof," no specific finding of an ouster is essential. Findings that plaintiffs are the owners and entitled to the possession and that defendants have withheld and continue to withhold the possession of the premises from the plaintiff satisfy the statute.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Cochise. F. M. Doan, Judge. Affirmed.

See opinion on rehearing.

The facts are stated in the opinion.

Ben Morgan, for Appellants.

English & Bowman, for Appellee.

THE COURT.—If we could, without violating the fundamental rules of practice, decide this case upon the briefs of counsel, enough could possibly be found therein in the way of statements and admissions, as to the action of the trial court, from which an intelligent review of the case might be made. The record itself, however, and not the briefs of counsel, must be the basis for any review of the case.

By stipulation the record on this appeal was restricted to the following papers, viz.: The judgment-roll, the motion for a new trial and the ruling thereon, a written stipulation as to a part of the evidence of the defendants in the action, certain exhibits, the bond on appeal, an assignment of errors, and an admission that the appellee is a corporation authorized to do business in this territory. There is no bill of exceptions and no statement of facts or transcript of the evidence in the

record. Counsel for appellants, in his brief, has argued the case as though the entire evidence was before us. As the judgment of the court recites that witnesses were sworn and testified in behalf of the respective parties, and documentary evidence introduced and filed, we cannot assume that the exhibits and the written stipulation contained in the record brought to this court constitute all of the evidence which the trial court had before it in rendering its judgment. The abbreviated record on this appeal presents no matter which this court can consider except the one question as to whether the pleadings support the judgment. The complaint contains the usual and ordinary allegations required in an action of ejectment under our statutes. The answer of the defendants is a general denial, and pleas founded upon the various statutes of limitations applying to actions for the possession of real property. The court found that the "plaintiff and its predecessors and grantors in interest, since the first day of January, 1875, have been, and the plaintiff still is, the owner and entitled to the possession of the lands and premises" sued for, and of each and every part and portion thereof; that none of the defendants are entitled to the possession of said lands and premises, or any part or portion thereof; and that the plaintiff is entitled to the immediate possession of the whole of said lands and premises, and to a writ of possession therefor. The court further found that for more than ten years preceding the fourteenth day of December, 1900, the defendants had withheld possession of divers portions of the land sued for from the plaintiff and its grantors and predecessors in interest, and that since said fourteenth day of December, 1900, the annual value of the rents, issues, and profits of that part of said land so withheld from plaintiff by said defendants were certain specific amounts set forth in the finding. The judgment of the court followed the findings, and ordered the restitution of the land sued for, and entered judgment against the defendants for the value, as thus found, of the rents, issues, and profits of the lands withheld by the defendants.

While there is no specific finding of an ouster by any of the defendants, the findings that the plaintiff and its grantors have been the owners and entitled to the possession of the land sued for since the first day of January, 1875, and that

the defendants have since the fourteenth day of December, 1900, withheld possession from the plaintiff and its grantors, and continue to so hold the same, meet the requirements of our statute in force at the time this action was begun. Paragraph 3139 of the Revised Statutes of 1887, reads as follows: "It shall be sufficient to entitle the plaintiff to recover to show at the time the action was commenced, the defendant was in possession of the premises claimed, and that the plaintiff had a right to the possession thereof."

The question whether the evidence was sufficient to establish the ownership of the lands in question by the appellee, and the question whether the defendants had shown peaceable and adverse possession under the statute of limitations set up in their answer, are not presented in the record, and therefore cannot be considered by us.

No error appearing upon the face of the record presented, the judgment of the trial court is affirmed.

[Civil No. 809. Filed March 20, 1903.]

[71 Pac. 902.]

ARTHUR J. EDWARDS, Administrator of the Estate of Edward P. Hayden, Deceased, Plaintiff and Appellant, v. **CHARLES F. SIMMS et al.**, Defendants and Appellees.

1. **APPEAL AND ERROR — ABSTRACT OF RECORD — BILL OF EXCEPTIONS — STATEMENT OF FACTS — NECESSITY FOR.**—An abstract of record cannot supply the absence of a bill of exceptions or statement of facts.
2. **SAME — SAME — INSUFFICIENCY — PREVENTS REVIEW — WHEN.**—Where the record does not contain the full contents of deed offered in evidence and rejected, the judgment will not be reversed for such rejection, as there might have existed valid reasons therefor, such as the form of its acknowledgment or defects in its execution which made it incompetent.
3. **HOMESTEAD — MORTGAGE — VALIDITY — CONVEYANCE BY ONE SPOUSE — EVIDENCE — VALUE IMMATERIAL — NO LIEN AS TO EXCESS.**—It is not error for the trial court to reject evidence offered by plaintiff

tending to show the value of the homestead was in excess of four thousand dollars, for the purpose of showing that a mortgage, invalid as against the homestead, attached to the excess, as every attempt by either spouse to convey or mortgage the homestead, without the other joining in such conveyance or mortgage, is unavailing to create any lien thereon, irrespective of the value thereof.

4. **SAME — SAME — CONVEYANCE — AGREEMENT TO ASSUME MORTGAGE — NOT BINDING — CONSIDERATION.**—An agreement by the grantees of a homestead to assume the payment of a mortgage thereon, as part payment of the purchase price, is without consideration, where the court found the mortgage to be null and void; the conveyance also being presumptively inefficient to convey any interest to the purchaser.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Edward Kent, Judge. Affirmed.

The facts are stated in the opinion.

Joseph H. Kibbey, for Appellant.

Baker & Bennett, for Appellee.

The wife cannot sell or convey her interest in the homestead to the husband. *Welsh v. Rice*, 31 Tex. 689, 98 Am. Dec. 556; *Kitterlin v. Milwaukee etc. Ins. Co.*, 134 Ill. 647, 25 N. E. 772, 10 L. R. A. 220; *Anderson v. Smith*, 159 Ill. 93, 42 N. E. 306; *Flege v. Garvey*, 47 Cal. 372; *Freirmuth v. Steigleman*, 130 Cal. 392, 80 Am. St. Rep. 138, 62 Pac. 615.

The deed in question is not acknowledged in the manner required by the statute then and now in force regarding acknowledgments by married women of instruments conveying the homestead, in this, that the certificate of acknowledgment does not show that she was examined separate and apart from her husband. Rev. Stats. 1887, pars. 226, 2581.

This defect in the acknowledgment is fatal to the effect of the instrument as a conveyance of the homestead. *Pease v. Barbiers*, 10 Cal. 437; *Landers v. Bolton*, 26 Cal. 393; *Ewald v. Corbett*, 32 Cal. 493; *Flege v. Garvey*, 47 Cal. 371; *Leonis v. Lazzarovich*, 55 Cal. 52; *Looney v. Adamson*, 48 Tex. 619; *Berry v. Donley*, 26 Tex. 745; *Rice v. Peacock*, 37 Tex. 392; *Sibley v. Johnson*, 1 Mich. 380.

Separate conveyances by husband and wife of the homestead are void. *Hart v. Church*, 126 Cal. 471, 77 Am. St. Rep. 195, 58 Pac. 910; *Flege v. Garvey*, 47 Cal. 371.

SLOAN, J.—Arthur J. Edwards, as administrator of the estate of Edward P. Hayden, deceased, brought suit against Charles F. Simms and George T. Brosius, as executors of the last will and testament of James T. Simms, deceased, Hanna T. Simms, the Simms Improvement Company, and others, to foreclose a mortgage given by James T. Simms in his lifetime to secure a note for three thousand dollars on property described as lots 1, 7, 9, 11, 13, 15, 17, 18, 19, 20, and 21 in block numbered 1 in Simms' Addition to the city of Phoenix. The court below found the mortgage to be null and void, and entered a personal judgment against the executors of the estate of James T. Simms, deceased, for the amount of the note, with interest thereon. Edwards, as the administrator of the estate of Hayden, deceased, has appealed from this judgment.

The answer of the defendant Hanna T. Simms averred that James T. Simms died on or about September 20, 1898, and that she was his surviving wife; that the premises mortgaged were acquired during the marriage between said James T. Simms and herself; that on the first day of November, 1887, and again on the twelfth day of October, 1888, the said James T. Simms filed declarations of homestead, covering the premises mortgaged; that subsequently, on the thirtieth day of December, 1893, she, as the wife of the said James T. Simms, made her declaration of homestead on the same premises, and the same had never been released, relinquished, sold, granted, conveyed, or abandoned by the said James T. Simms or by herself. The trial court found the mortgage to be null and void for the reason that at the time the same was given the premises were the community property of James T. Simms and Hanna T. Simms, his wife, and covered by the declaration of homestead made by the latter.

From that part of the judgment declaring said mortgage null and void, Edwards, as the administrator of the estate of Hayden, deceased, brings this appeal. The appellant complains of the court's ruling in sustaining defendants' objection to the introduction of a certain deed purporting to be a

release executed by Hanna T. Simms to her husband, James T. Simms, prior to the execution of the mortgage and her declaration of homestead, "of all her right, title, and interest or estate, either real, contingent or expectant, and of every nature and description whatsoever, in and to the property which her husband, James T. Simms, owned or possessed, or which he may hereafter acquire during his lifetime," etc. The bill of exceptions in this case does not contain a copy of this deed, nor does it set forth its contents, nor does it anywhere appear in the record. In the abstract filed, the appellant recites the granting clause of the deed substantially as above given, but the full contents of the deed nowhere appear. But aside from this, an abstract cannot supply the absence of a bill of exceptions or statement of facts. The omission to bring up the evidence in the record makes it impossible for this court to reverse the cause for the reason stated. There might have existed valid reasons for the rejection of the deed in evidence, such as the form of its acknowledgment, or defects in its execution which made it incompetent as evidence, aside from its legal effect as a release of the homestead.

The appellant has assigned as error the refusal of the trial court to permit appellant to introduce evidence showing the value of the mortgaged property to be in excess of four thousand dollars, so as to show that the mortgage, even assuming it to be invalid as against the homestead right of Hanna T. Simms, yet attached to such excess. In the case of *Quackenbush v. Reed*, 102 Cal. 493, 37 Pac. 755, the supreme court of California had the same question before it. That court held that the homestead consisted of the land or premises described, and every attempt to convey or mortgage it by either spouse, without the other joining in such conveyance or mortgage, is unavailing to create any lien thereon, and that, too, notwithstanding the value of the homestead might be in excess of the value allowed to the family as a homestead. The Homestead Act of California was the basis for the Homestead Act in force in the territory at the time Hanna T. Simms made her declaration. The Arizona act, following the California statute, provided that a married man should not sell or lease the homestead, or create any lien thereon, without being joined by his wife. Other provisions of the act per-

mitted the plaintiff in execution, who might be dissatisfied with the value of the land claimed as a homestead, to have its value determined by appraisers provided for in the act, and any excess in its value above four thousand dollars applied in satisfaction of his execution. To hold that a married man might, without being joined by his wife, mortgage a homestead so as to make the mortgage good and enforceable against any excess in its value above four thousand dollars, as very properly held by the California supreme court, would be to permit him to create a lien upon such homestead, and to permit a thing forbidden by the statute. The trial court did not err in rejecting the evidence offered by plaintiff tending to show the value of the homestead.

The appellant further complains that the court should have entered judgment against certain of the defendants who were shown to have purchased certain of the lots covered by the mortgage, and by the declaration of homestead subsequent to the same, for the reason that it was shown that, as a part consideration for such purchases, they agreed to pay the mortgage debt. As the court found the mortgage to be null and void, it necessarily found that the consideration for such agreement had failed. For these conveyances, as well as the mortgage, were inefficient to convey away any of the rights of Hanna T. Simms, and presumptively inefficient to convey any interest to the purchasers. It would be illogical for the court to hold that the mortgage was void, and yet seek to bind these purchasers of the mortgaged premises for the payment of the same.

The judgment of the trial court is affirmed.

Davis, J., and Doan, J., concur.

[Civil No. 814. Filed March 20, 1903.]

[71 Pac. 915.]

MARIA DEL CARMEN PESQUEIRA et al., Defendants
and Appellants, v. **MINERVA D. KELLOGG, Plaintiff**
and Appellee.

1. **PARTITION—COTENANT—IMPROVEMENTS—COMPENSATION—DISTRIBUTION—GENERAL RULE—IMPROVEMENTS MADE BY THIRD PERSON.**—Where, in an action for partition, the evidence discloses that the stepfather of defendants, minors, made valuable improvements on the property, but it was not shown that defendants made any improvements thereon, or that they paid for or were obligated to pay for the same, the rule that, on partition, improvements made in good faith by one cotenant, unless such improvements were essential to the preservation of the property, should be taken into account by the court, and either a suitable compensation be made therefor to such cotenant, or, if it can be done without prejudice to the interest of the other parties, such improvements should be assigned to the cotenant making them, does not apply.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Edward Kent, Judge. Affirmed.

The facts are stated in the opinion.

Street & Alexander, for Appellants.

The rule is, in suits for partition of lands, where improvements have been made by one tenant in common, that the court should direct in making partition that the portion improved be assigned to the one making the improvements, and this without taking into consideration the value of such improvements. *Dean v. O'Meara*, 47 Ill. 120; *Martindale v. Alexander*, 26 Ind. 104, 89 Am. Dec. 458; *Ford v. Knapp*, 102 N. Y. 135, 55 Am. Rep. 782, 6 N. E. 283; *Johnson v. Pelot*, 24 S. C. 255, 58 Am. Rep. 253; *Hall v. Piddock*, 21 N. J. Eq. 311; *Osborn v. Osborn*, 62 Tex. 495; *Ward v. Ward*, 15 Ky. Law Rep. 706, 25 S. W. 112; *Boley v. Skinner*, 38 Fla. 391, 20 South. 1017; *Leake v. Hays*, 13 Wash. 213, 52 Am. St. Rep. 34, 43 Pac. 48; *Pipkin v. Pipkin*, 120 N. C. 161, 26 S. E. 697.

Millay & Christy, and Walter Bennett, for Appellee.

SLOAN, J.—The record in this case discloses the following facts: Upon February 4, 1887, one Miguel Pesqueira died in the city of Phoenix. He left a widow, Carmen Pesqueira, and five children, named Eladio Pesqueira, Miguel Pesqueira, Maria del Carmen Pesqueira, Maria de los Angeles Pesqueira, Maria de la Cruz Navarro, and Ignacio Pesqueira. All of said children were, at the time of the death of the father, minors, with the exception of Eladio, who had then reached his majority. At the time of his death, Miguel Pesqueira was the owner of property situated in the city of Phoenix, and described as follows: Lots numbered 2, 4, 6, 8, and 10 in block 1, and 37½ feet off from the south end of lots numbered 9 and 11 in block 5, of said city. This property, having been acquired subsequent to the marriage of Miguel Pesqueira and Carmen Pesqueira, upon his death, under the statutes, one half of the same went to the surviving wife, and one half passed to his said children. On the fifteenth day of March, 1887, Eladio Pesqueira, in writing, renounced all his right to participate as an heir of said Miguel Pesqueira in and to the said property. During the same year Ignacio Pesqueira, one of the said minor children, died, whereupon, by operation of the statute, one half of his interest as an heir passed to his mother, Carmen Pesqueira, and one half to his surviving brothers and sisters. During the year 1890 the widow, Carmen Pesqueira, and her son Eladio Pesqueira, gave a mortgage upon their interests to said property to one Backus, which mortgage was afterwards foreclosed, and a sale of the interests mortgaged had thereunder in 1894, at which sale Backus became the purchaser, and in due season received a sheriff's deed to the same. In 1898 Backus conveyed to the appellee, Minerva D. Kellogg, the interests in said property obtained by him through said foreclosure proceedings and the sheriff's deed. Subsequent to the execution of the said mortgage the widow, Carmen Pesqueira, married one Paola Perazzo. This action was brought by appellee, Minerva D. Kellogg, against Carmen Perazzo and her husband, Paola Perazzo, and the surviving heirs of Miguel Pesqueira, to obtain a partition of the property before described. In her complaint the appellee set up that she was the owner of an undivided nineteen thirtieths of said property; that the value of the property was the sum of three thousand five

hundred dollars; that the defendants had had the exclusive possession of said premises, had rented the same, and collected the rents therefor without accounting to her, had neglected to properly care for the property, had allowed the same to depreciate in value, had neglected to pay the taxes thereon, and had permitted the same to be sold at delinquent tax-sales, thereby compelling her to redeem the same from said sales; and that she had expended, on account of said taxes, the sum of four hundred dollars. The defendants Maria del Carmen Pesqueira, Maria de los Angeles Pesqueira, Miguel Pesqueira, and Maria de la Cruz Navarro filed a separate answer to the complaint, in which answer, among other things, they denied the extent of the interest claimed by the plaintiff, and set up that they were the owners of an undivided one half thereof. They further set up the relinquishment by their brother Eladio Pesqueira to them of his interest as an heir. They further allege that they had since the year 1894 paid the sum of \$266.77 in the way of territorial and county taxes, and the sum of \$137.09 in the way of city taxes, on said property. They further set up that subsequent to the year 1894 they made improvements and betterments on the premises for which they had paid the sum of nine hundred dollars, no part of which, they allege, the plaintiff had ever paid to these defendants. Paola Perazzo appeared and filed a cross-complaint, in which he asserted the ownership and right of possession to and for the premises sought to be partitioned, and prayed that his title be quieted as against the claim of the plaintiff in the action and his co-defendants. His claim of ownership was based upon a tax-deed executed by the treasurer and *ex officio* tax-collector of Maricopa County for delinquent taxes due for the year 1899. Upon the trial Maria de la Cruz Navarro testified, among other things, that the stepfather, Paola Perazzo, had made certain improvements, in the way of buildings and repairs, on part of the premises sought to be partitioned, and expended something over six hundred dollars in rebuilding a house, and two hundred dollars in the way of repairs; that this expenditure was made by Perazzo for the benefit of the heirs, but before any of the defendants, with the exception of Eladio Pesqueira, had become of age. She stated that she thought the house was built by Perazzo "something like eleven years ago." She further

stated that Perazzo, her stepfather, had said at the time he built the house that he would charge it to the heirs, and that after they became of age they could pay him for it. No other testimony was put in with reference to the improvements made by any of the defendants on the property.

The trial court found, among other things, that the appellee was the owner in fee simple of an undivided 716/1200 part of the property sought to be partitioned, and that each of the defendants Maria de la Carmen Pesqueira, Maria de los Angeles Pesqueira, Miguel Pesqueira, and Maria de la Cruz Navarro was the owner of an undivided 121/1200 part of the said premises, and that the defendants Carmen A. Perazzo and Eladio Pesqueira had no right, title, or interest in the same. A decree was entered in accordance with the findings, and an order was made by the court that the premises be divided and partitioned between the appellee and the defendants above named in the proportion as found by the court to which each was entitled, and a commission was appointed to make such division and partition, and to report the same to the court. The commissioners appointed in accordance with such order allotted to the appellee 37½ feet on the south end of lots 9 and 11 in block 5, and lots 2, 4, 6, and a strip eighteen feet wide off the east side of lot 8, in block 1. Upon the written request of the defendants interested that their respective portions be allotted to them without division, the commissioners allotted to the defendants, as their portion, lot 10 and the west thirty-two feet or a strip thirty-two feet wide on the west side of lot 8 in said block 1. Upon the coming in of this report of the commissioners, the defendants entitled to share in said partition filed objections to said report upon the ground that the commissioners, in making such division, had not allowed the value of the improvements placed upon them, as they alleged, in good faith, and at their own cost and expense. The trial court disregarded these objections and confirmed the report.

The appellants complain that the trial court erred in refusing to make a finding of fact on the issue raised by them in their answer as to the improvements placed upon the premises partitioned, and in refusing to instruct the commissioners in partition to allot to them that portion of the premises upon which such improvements were made, without charging them

for the value thereof, and in refusing them the privilege of submitting evidence on their exceptions to the said report of the commissioners touching such improvements.

It is a settled rule that, on partition, improvements made in good faith by one cotenant, unless such improvements were essential to the preservation of the property, should be taken into account by the court, and either a suitable compensation be made therefor to such cotenant, or, if it can be done without prejudice to the interest of the other parties, such improvements should be assigned to the cotenant making them, in any division made in the partition suit. In the case at bar the defendants did not show that they had made any improvements for which they were entitled to be compensated in either of the modes recognized by the rule referred to. On the contrary, it appears from their own showing that the improvements which were made upon the property were made by Paola Perazzo, their stepfather; and there was no proof that they had paid for the same, or were obligated to pay for the same. The finding requested of the court and refused was not sustained by the proof. It would have been improper, therefore, for the court, in its order, to have directed the commissioners to have taken into account in any way the value of such improvements. The objections made to the report of the commissioners were likewise not well taken, for the same reason.

We find no error in the record, and the judgment of the trial court is affirmed.

Davis, J., and Doan, J., concur.

[Criminal No. 168. Filed March 20, 1903.]

[71 Pac. 911.]

PASQUEL MAZZOTTE, Defendant and Appellant, v. TERRITORY OF ARIZONA, Plaintiff and Respondent.

- 1. CRIMINAL LAW—ASSAULT WITH DEADLY WEAPON—EVIDENCE—CIRCUMSTANTIAL—SUFFICIENCY.**—Defendant went to the house of De Grazia and called to De Grazia to come out. De Grazia's son came to the door and asked, "What do you want?" Defendant replied, "Tell your father to come out. I want to kill him." The boy replied that his father was changing his clothes, whereupon defendant

said, "You come out." The son stepped out, and then defendant said, "If I can't get your father, I will get you," and immediately pulled a pistol, fired at the boy, and then turned and ran. Defendant stood forty feet from the boy when he fired. No one was hit, nor was any mark of a bullet found. *Held*, that the declaration of the defendant that he intended to kill the boy, followed by the act of firing the pistol and his flight, were circumstances from which the jury might reasonably have inferred that the pistol was loaded.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Graham. F. M. Doan, Judge. Affirmed.

The facts are stated in the opinion.

L. Kearney, for Appellant.

The state must prove the gun was loaded. *State v. Napper*, 6 Nev. 113; *Skidmore v. State*, 43 Tex. 93.

When a deadly weapon is charged the evidence must so prove. *Kouns v. State*, 3 Tex. App. 13; *McGrew v. State*, 19 Tex. App. 304; *Hilliard v. State*, 17 Tex. App. 210.

The state must prove that the pistol was loaded, capable of inflicting bodily harm, and a deadly weapon. *Klein v. State* 9 Ind. App. 365, 52 Am. St. Rep. 354, 36 N. E. 763.

In the case of *People v. Jacobs*, 29 Cal. 579, Judge Sawyer held, "That a pistol may be of such dimensions as to be a deadly weapon without being charged, and it may be so small as to be, without being charged, a very insignificant instrument of assault." Cited in *People v. Congleton*, 44 Cal. 94; *People v. Villarino*, 66 Cal. 229, 5 Pac. 154; *State v. Godfrey*, 17 Or. 305, 11 Am. St. Rep. 830, 20 Pac. 625.

Further upon the question that the state must prove the lethal character of the weapon,—that it was in fact a deadly weapon,—see *Branch v. State*, 35 Tex. Cr. 304, 33 S. W. 356; *Ballard v. State* (Tex. App.), 13 S. W. 674; *Stephenson v. State*, 33 Tex. Cr. 162, 25 S. W. 784; *Jenkins v. State*, 30 Tex. App. 379, 17 S. W. 938.

E. W. Wells, Attorney-General, for Respondent.

SLOAN, J.—A single question is presented for our determination on this appeal. It is urged that the proof is in-

sufficient to sustain the judgment of conviction of an assault with a deadly weapon, for the reason that the evidence did not establish the lethal character of the weapon used by the defendant.

The proof establishes that Mazzotte, the defendant, on the evening of July 26, 1902, went to the house of one Gregoria De Grazia, in Morenci, and, standing in the street, called to De Grazia, and invited him to come out. Thereupon Frank De Grazia, a son of Gregoria De Grazia, came to the door and said, "What do you want?" Mazzotte replied: "Tell your father to come out. I want to kill him." The son said that his father was changing his clothes, whereupon Mazzotte said, "You come out." The son, with his mother and little brother, stepped out of the house, and stood in front of and a little to one side of the door. Mazzotte then said, "If I can't get your father I will get you," and immediately thereafter pulled out a pistol, fired at the boy, and then turned and ran away. The place where Mazzotte stood when he fired was about forty feet from the place where De Grazia stood. No one was hit, nor was any mark of a bullet found. The appellant testified that he was drunk upon the day in question, and had no recollection of what he did or what took place at the time. There was no other evidence tending to prove the deadly character of the weapon used by the defendant. "A deadly weapon is one which, from the use made of it at the time, is likely to produce death or great bodily injury. In a case of doubt, the manner in which the weapon is used may be taken into the account in determining whether or not it was deadly." Bishop on Statutory Crimes, sec. 320. In the present case the declaration of the defendant at the time that he intended to kill De Grazia, followed by his act of firing the pistol in the direction of the latter, and his flight, were circumstances from which the jury might reasonably have inferred that the pistol used was loaded. It is a matter within the common knowledge of men that almost any kind of a pistol, if loaded and fired at a person within a distance of forty feet, is capable of inflicting a serious wound. We think the evidence was sufficient to justify the verdict of conviction and to sustain the judgment.

The judgment is affirmed.

Kent, C. J., and Davis, J., concur.

[Criminal No. 166. Filed March 20, 1903.]

[71 Pac. 932.]

WALTER TRIMBLE, Defendant and Appellant, v. TERRITORY OF ARIZONA, Plaintiff and Respondent.

1. **CRIMINAL LAW — RAPE — EVIDENCE — TESTIMONY OF PROSECUTRIX — SUFFICIENT TO CONVICT — CURBY v. TERRITORY, 4 ARIZ. 371, 42 PAC. 953, FOLLOWED.**—Rape is not one of the offenses which requires corroborative evidence, and a conviction thereof may be had upon the testimony of the victim alone.
2. **SAME — SAME — SAME — COMPLAINT — CORROBORATION.**—In a prosecution for rape, it is always competent for the prosecution to show as a part of its case that complaint was made recently after the commission of the outrage, and this fact is treated as a circumstance corroborative of the complainant's testimony.
3. **SAME — SAME — SAME — SAME — LAPSE OF TIME BETWEEN ACT AND COMPLAINT — AFFECTS WEIGHT BUT NOT ADMISSIBILITY — SURROUNDING CIRCUMSTANCES — MUST BE CONSIDERED.**—Lapse of time between the commission of the crime of rape and complaint by the prosecutrix affects the weight but not the admissibility of evidence of complaint having been made; and in considering what weight should be given to such testimony, regard should be taken of the surrounding circumstances, such as intimidation by threats, or lack of opportunity.
4. **SAME — SAME — CHARGE TO JURY.**—In a prosecution for rape the court charged that the prosecution relied upon the testimony of the prosecutrix alone; that the uncorroborated testimony of the prosecutrix, unsustained by other evidence, or by facts and circumstances corroborating it, should be viewed with great caution; that in considering her testimony the jury may take into consideration the facts and circumstances surrounding the place where the alleged offense is charged to have been committed,—all the facts and circumstances at the time and immediately after the alleged offense was committed,—in determining the weight of her testimony and the reasonableness thereof. *Held*, that such instruction was neither unfavorable nor prejudicial to the defendant.
5. **SAME — SAME — SAME — WITNESSES — CREDIBILITY — RIGHT OF JURY TO DISREGARD TESTIMONY.**—In a prosecution for rape it was not error for the court to charge the jury: "If you believe that any witness has willfully testified falsely as to any material fact in the case, you are at liberty to disregard the entire testimony of such witness, except in so far as it may be corroborated by the other evidence in the case."

6. APPEAL AND ERROR—CRIMINAL LAW—RAPE—CONFLICT IN EVIDENCE—VERDICT—WILL NOT BE DISTURBED—TERRITORY v. MIRAMONTEZ, 4 ARIZ. 179, 36 PAC. 35; ANDERSON v. TERRITORY, 6 ARIZ. 185, 56 PAC. 717; DICKSON v. TERRITORY, 6 ARIZ. 199, 56 PAC. 971, FOLLOWED.—Where there is a substantial conflict in the evidence between the prosecutrix and the defendant and his accomplice in a prosecution for rape, and no attack was made upon the credibility of prosecutrix aside from those contradictions, and no motive for perjury shown, the verdict will not be disturbed on appeal.
7. CRIMINAL LAW—RAPE—JUROR—PREJUDICE.—Where, after the trial and conviction of defendant for rape, one of the jurors stated in a street conversation that "he liked to sit on such cases as a jurymen, and that he liked to send such fellows as that over the road," and the said juror on his examination on his *voir dire* had sworn that he knew nothing whatever of the case, and was absolutely without bias or prejudice in the matter, there is nothing to warrant the conclusion that the verdict was influenced by bias or prejudice.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Graham. F. M. Doan, Judge. Affirmed.

The facts are stated in the opinion.

W. C. McFarland, for Appellant.

The court erred in that part of its charge in which he told the jury that complaints by prosecutrix after she got away from and out of control of defendant were to be taken into consideration as corroboration of prosecutrix. *State v. Anderson*, 6 Idaho, 706, 59 Pac. 180; *People v. Lambert*, 120 Cal. 170, 52 Pac. 309.

There was no evidence introduced in the cause that the prosecutrix made complaint at or immediately after the date of the alleged offense. According to her own testimony, it was about a year afterward. According to the testimony of another witness, it was not until about seven months after that complaint was made, though the evidence in the cause shows that the prosecutrix knew that one Benevedas was at the time of the alleged offense occupying an adjoining room; that she saw Benevedas a few minutes after the time she testifies the offense was committed; that she saw the constable in the room a very short time after she testifies the assault was made; that she attended the public schools at Clifton

for about two weeks after the date of the alleged offense, and rode in a wagon from Clifton to Coronado, spent the evening at Coronado with a gang of bridge carpenters, stopped in Duncan for an hour or more, where appellant bought supplies, and a month with her father at El Paso, and some two weeks at Duncan after their return, appellant being absent during this time looking for work. With all these opportunities to make complaint, a large part of the time out of the control and influence of appellant and his wife, it never occurred to her to complain of this outrage until the evening of July 19th, nearly seven months after the date the offense is alleged to have been committed. These facts and circumstances conclusively show that prosecutrix was frequently out of the influence and control of appellant and his wife, and had abundant opportunity to complain to people who would have offered her complete protection, during the seven months that intervened between the date of the alleged offense and the time she made complaint to Mrs. Phillips in Duncan. That she failed to avail herself of any of these opportunities conclusively shows that it was not fear of the defendant and his wife or want of opportunity that caused her to delay for this great length of time in making complaint of the offense charged. *People v. Benson*, 6 Cal. 221, 65 Am. Dec. 506; *People v. Hamilton*, 46 Cal. 540; *People v. Brown*, 47 Cal. 447; *People v. Ardaga*, 51 Cal. 371; *People v. Hulse*, 3 Hill, 309; *Matthews v. State*, 19 Neb. 330, 27 N. W. 234; *Curby v. Territory*, 4 Ariz. 371, 42 Pac. 953; *Tway v. State*, 7 Wyo. 74, 50 Pac. 188; *State v. Baker*, 6 Idaho, 496, 56 Pac. 81.

E. W. Wells, Attorney-General, for Respondent.

The jury may convict of the crime of rape on the uncorroborated testimony of prosecutrix. *Curby v. Territory*, 4 Ariz. 371, 42 Pac. 953; *People v. Wessel*, 98 Cal. 352, 33 Pac. 216; *Tway v. State*, 7 Wyo. 74, 50 Pac. 188; *State v. Anderson*, 6 Idaho, 706, 59 Pac. 180.

In considering the charge of the court to the jury, the whole charge taken together should be considered, rather than isolated sentences. *United States v. Tenney*, 2 Ariz. 29, 127, 8 Pac. 295, 11 Pac. 472; *People v. Clark*, 84 Cal. 573, 24 Pac. 313.

Complaint made by the prosecutrix after commission of the crime and particular marks of violence and other indications, and the facts of the offense, are competent evidence confirmatory of her testimony. 2 Bishop on Criminal Procedure, par. 963.

And the substance of what she said, or the declarations made by her after the commission of the offense, may be given in evidence to corroborate her testimony. The remoteness of such statement and cause therefor are circumstances for the jury to consider in weighing the testimony of prosecutrix. *McComb v. State*, 8 Ohio St. 643; *Johnson v. State*, 17 Ohio, 593; *Loughlin v. State*, 18 Ohio, 99, 51 Am. Dec. 444; *State v. DeWolf*, 8 Conn. 93, 20 Am. Dec. 90; *Pleasant v. State*, 15 Ark. 624.

DAVIS, J.—The appellant, Walter Trimble, was tried at the October term, 1902, of the district court of Graham County, upon an indictment charging him with the crime of rape. He was convicted and sentenced to imprisonment for life in the territorial prison. He appeals from the judgment of conviction and from the order denying his motion for a new trial.

Three of the trial court's instructions are objected to by the appellant as containing reversible error, the first complained of being as follows: "If you find from the evidence that the prosecuting witness was intimidated by threats of the defendant and his wife from making complaint while she was under their control, and made complaint of the alleged outrage at her first opportunity after getting away from or out of the control of the defendant and his wife, you may consider that fact as a circumstance tending to corroborate the testimony of the witness." It is claimed that by this instruction the court misstated the effect of evidence of the character referred to, and virtually said to the jury that the prosecutrix might be corroborated by her own statements, while the only legal purpose which such evidence could really serve would be to explain her failure to make an immediate complaint, and rebut any unfavorable inference which might otherwise be drawn from her silence. Even were counsel for appellant correct in his criticism, it is difficult to see the importance of the distinction drawn, since rape is not one of the offenses

which requires corroborative evidence, and a conviction thereof may be had upon the testimony of the victim alone. *Curby v. Territory*, 4 Ariz. 371, 42 Pac. 953. But complaint of the outrage by the prosecutrix at the earliest opportunity has frequently been denominated by the courts as a circumstance corroborative of her testimony. *Pefferling v. State*, 40 Tex. 486; *State v. Niles*, 47 Vt. 82; *Baccio v. People*, 41 N. Y. 265; *Thompson v. State*, 38 Ind. 39; *Laughlin v. State*, 18 Ohio, 99, 51 Am. Dec. 444; *State v. Mulkern*, 85 Me. 106, 26 Atl. 1017; *State v. Sargent*, 32 Or. 110, 49 Pac. 889; *State v. Imlay*, 22 Utah, 156, 61 Pac. 557. The natural instinct of a female thus outraged and injured prompts her to disclose the occurrence at the earliest opportunity to some relative or friend who has interest in her welfare; and the absence of such a disclosure tends to discredit her as a witness, and may raise an inference against the truth of the charge. To avoid such discredit and inference, it is always competent for the prosecution to show, as a part of its case, that complaint was made recently after the commission of the outrage, and this fact is treated as a circumstance corroborative of the complainant's testimony. *State v. Neel*, 21 Utah, 151, 60 Pac. 510. But mere lapse of time between the perpetration of the act and the complaint is not the test of its admissibility. As said by Church, C. J., in a New York case, "Any considerable delay on the part of the prosecutrix to make complaint of the outrage is a circumstance of more or less weight, depending on surrounding circumstances. There may be many reasons why a failure to make immediate or instant outcry should not discredit the witness. A want of suitable opportunity, or fear, may sometimes excuse or justify a delay. There can be no universal law on the subject." *Higgins v. People*, 58 N. Y. 377. In connection with the instruction above quoted, the court below also said to the jury: "The failure to make a complaint of an offense of this character within a reasonable time after the commission or alleged commission of such offense can be considered by the jury as a circumstance tending to discredit the testimony of the prosecuting witness, unless the jury believe from the evidence that such witness was intimidated by threats from making such disclosure, or was so situated during such time that she had not an opportunity to do so." Considering the whole in-

struction given upon this point, and its applicability to the evidence, we do not think the jury could have been materially misled by the court's statement of the law.

The following instruction was given by the court: "In this case the prosecution relies for a conviction upon the testimony of Lydia Sparks, the prosecuting witness, and no other witness was called by the territory to testify directly to the time and place or circumstances of the alleged offense; and you are instructed, in cases where the territory relies upon the uncorroborated testimony of the prosecutrix, unsustained by other evidence, or by facts and circumstances corroborating it, that you should view such testimony with great caution, and it is the duty of the court to warn the jury of the danger of conviction on such testimony. You are further instructed that in considering her testimony you may take into consideration the facts and circumstances surrounding the place where the alleged offense is charged to have been committed—all the facts and circumstances at the time and immediately after the alleged offense was committed—in determining the weight of her testimony, and the reasonableness thereof, as tending to show to your minds the credit to be given to the same." This instruction is attacked, but we fail to see wherein it was unfavorable to the appellant, or how it could possibly have operated to his prejudice.

Again, the court charged the jury: "If you believe that any witness has willfully testified falsely as to any material fact in the case, you are at liberty to disregard the entire testimony of such witness, except in so far as it may be corroborated by the testimony of other credible witnesses, or supported by other evidence in the case." It is claimed that this instruction was held to be erroneous in *People v. Compton*, 123 Cal. 403, 56 Pac. 45, but an examination of that case fails to sustain the assertion. The instruction there given to the jury was "that you are not at liberty to disregard the testimony of a witness, where you may believe from the evidence that such witness is corroborated by other competent evidence and the circumstances in proof in the case"; and this was condemned as trespassing upon the domain of the jury, who, under the law, were the sole judges of the credibility of the witnesses and of the weight to be accorded to their testimony. Substantially the same form of instruction

as is here complained of has been approved in many cases. *Hoge v. People*, 117 Ill. 45, 6 N. E. 796; *Pierce v. State*, 53 Ga. 365; *State v. Kellerman*, 13 Kan. 133; *Mead v. McGraw*, 19 Ohio St. 55; *Jones v. People*, 2 Colo. 351; *Senter v. Carr*, 15 N. H. 351; *State v. Freiderich*, 4 Wash. 204, 29 Pac. 1055, 30 Pac. 328, 31 Pac. 332; *Cameron v. Wentworth*, 23 Mont. 70, 57 Pac. 648; *Faulkner v. Territory*, 6 N. M. 464, 30 Pac. 905.

The next assignment of error is that the evidence was insufficient to support the verdict. The victim of the defendant's alleged crime was his stepdaughter, a child aged eleven years. Her testimony concerning the use of force, the consummation of the act, and the circumstances attending the offense, was clear and positive. The fact of her subsequent complaint of the outrage, together with additional corroborating circumstances, were testified to by other witnesses. If the jury believed the testimony of the prosecutrix, there was ample proof to sustain every allegation of the indictment. The record discloses no motive for perjury on her part. She was contradicted by the defendant and another person who was at the time under indictment for aiding and abetting in the crime. Aside from this, there was no attack made upon the credibility of the prosecutrix. The jury were apparently convinced of the truthfulness of her story, and disbelieved the testimony of the accused. There existed a substantial and direct conflict in the evidence, and, under a well-established rule, this court will not, upon the ground urged, disturb the verdict. *Territory v. Miramontez*, 4 Ariz. 179, 36 Pac. 35; *Hackett v. Territory*, 5 Ariz. 251, 52 Pac. 358; *Anderson v. Territory*, 6 Ariz. 185, 56 Pac. 717; *Dickson v. Territory*, 6 Ariz. 199, 56 Pac. 971.

It is further contended that a new trial should have been granted because one of the jurors was actuated by prejudice against the defendant in the trial of said cause, and had made statements showing that he was disqualified to act as a juror in the case. The juror referred to was James Turner, and an affidavit made by one Charles E. Dallas set forth a street conversation alleged to have been had by him with Turner subsequent to the trial, in the course of which, referring to the case, "affiant said to the said James Turner that that is one case that he (affiant) would not want to sit on, to which

Turner replied that he liked to sit on such cases as a jurymen, and that he liked to send such fellows as that over the road." This was the only proof offered in the trial court to support this ground of the motion for a new trial. The record shows that at the impanelment of the jury the following answers, under oath, were made by Turner on his *voir dire* examination: By the district attorney: "Q. Mr. Turner, do you know either of these parties?—A. No, sir.—Q. Have you heard any of the facts in this case?—A. Never heard of it at all.—Q. Have you any opinion as to the guilt or innocence of the accused?—A. No, sir.—Q. Have you any prejudice against or bias in favor of this defendant?—A. No, sir." Cross-examination by defendant's counsel: "Q. Have you ever seen any account of this trouble in the papers?—A. No, sir.—Q. Or talked with any one about it?—A. No, sir.—Q. Or any one talked to you?—A. No, sir.—Q. In fact, you don't know anything about the circumstances of the case?—A. No, sir; I never knew before there was such a case.—Q. Would the fact that one is charged with crime breed in your mind any prejudice against him, or bias in his favor?—A. No, sir.—Q. And you could try one charged with the crime of rape just as you would try one for any other offense?—A. Yes, sir.—Q. And would do it?—A. Yes, sir.—Q. There is no reason, then, why you would not go into the jury-box in this case, and return a fair and impartial verdict according to all the evidence detailed by the witnesses?—A. No, sir.—Q. And you have no bias one way or the other?—A. No, sir." While it would not be surprising, in cases of this character, to occasionally find that passion and prejudice had found its way into the jury-box, there is nothing here presented sufficient to warrant the conclusion that the verdict in this case was influenced by any such feeling, and we think that the motion for a new trial was properly denied.

This disposes of all the errors assigned, and the judgment of the court below is affirmed.

Kent, C. J., and Sloan, J., concur.

[Criminal No. 167. Filed March 20, 1903.]

[71 Pac. 934.]

BETTIE TRIMBLE, Defendant and Appellant, v. TERRITORY OF ARIZONA, Plaintiff and Respondent.

1. **CRIMINAL LAW—RAPE—PRINCIPAL—ACCESSORY—INDICTMENT—SUFFICIENCY—REV. STATS. ARIZ. 1901, PENAL CODE, SECS. 27, 230, 845, CITED.**—Section 230 of the Penal Code, *supra*, defines rape to be "an act of sexual intercourse, accomplished with a female, not the wife of the perpetrator, under either of the following circumstances," among which the first is "where the female is under the age of seventeen years." Section 27, *supra*, makes all persons concerned in the commission of a crime, whether they directly commit the act or aid and abet in its commission, principals. Section 845, *supra*, provides that "The distinction between an accessory before the fact and a principal, and principals in the first and second degree is abrogated; . . . and all persons concerned in the commission of a felony . . . shall hereafter be prosecuted, tried and punished as principals, and no other facts need be alleged in an indictment against such accessory than are required in an indictment against his principal." In a prosecution for rape an indictment charging that defendant made an assault on one S, "and did aid, abet, and assist one W. T. to unlawfully and feloniously ravish and carnally know her, the said S., and to unlawfully and feloniously accomplish an act of sexual intercourse with said S., she not being his wife," fails to allege that W. T. in fact committed the crime of rape, and therefore charges no substantive offense punishable by the laws of this territory.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Graham. F. M. Doan, Judge. Reversed.

The facts are stated in the opinion.

W. C. McFarland, for Appellant.

There are no facts alleged in the indictment charging the defendant as principal, nor with the crime of rape; hence no facts are alleged in said indictment constituting an offense against the laws of the territory of Arizona. It was error of the court to permit the territory, over objections of the defendant, to introduce any evidence where no offense was

charged in the indictment. *Usselton v. People*, 149 Ill. 612, 36 N. E. 952; *State v. Gifford*, 19 Wash. 464, 53 Pac. 709.

The United States supreme court, in passing on the sufficiency of an indictment, where the objections urged were similar to those of the case at bar, lays down the rule as follows: "Every ingredient of which the offense is composed must be accurately and clearly alleged. The indictment must set forth the offense with clearness and all necessary certainty to apprise the accused of the crime with which he is charged"; that facts are to be stated, not conclusions of law alone; that crime is made up of facts and intent, and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances. *United States v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588; *Dunbar v. United States*, 156 U. S. 185, 15 Sup. Ct. 325, 39 L. Ed. 390; *United States v. Burns*, 54 Fed. 351; *State v. Russell*, 64 Kan. 798, 68 Pac. 615; *Fink v. Milwaukee*, 17 Wis. 26; *La-sindo v. State*, 2 Tex. App. 59; *Williams v. State*, 12 Tex. App. 395; *State v. Locke*, 15 Ind. 419; *State v. Morgan*, 112 Mo. 202, 20 S. W. 456; *People v. Campbell*, 40 Cal. 129; *People v. Schwartz*, 32 Cal. 160; *State v. Terry*, 109 Mo. 601, 19 S. W. 209.

E. W. Wells, Attorney-General, for Respondent.

One who aids and abets in commission of crime of rape, even if he does not directly commit the act, is a principal under the Arizona statute, and defendant, Bettie Trimble, aiding and abetting in the commission of the offense, thereby committed legal rape, or rape in law. Rape being a statutory offense, the statutory terms and no other should be used to identify it. *Tway v. State*, 7 Wyo. 74, 50 Pac. 188.

Our modern system of pleading by indictment does not require a statement of the acts with all the particularities, as by the early systems or common law. *People v. King*, 27 Cal. 510, 87 Am. Dec. 95; *People v. Schwartz*, 32 Cal. 164.

DAVIS, J.—The appellant, Bettie Trimble, was charged by indictment with "a felony committed as follows: The said Bettie Trimble, on or about the twenty-fifth day of January, A. D. 1901, and before the finding of this indictment, at the county of Graham, territory of Arizona, did, willfully, un-

lawfully and feloniously upon the person of one Lydia Sparks, a female under the age of seventeen years, make an assault, and the said Bettie Trimble then and there being, did aid, abet and assist one Walter Trimble to unlawfully and feloniously ravish and carnally know her, the said Lydia Sparks, and unlawfully and feloniously accomplish with her the said Lydia Sparks then and there an act of sexual intercourse, the said Lydia Sparks then and there not being the wife of the said Walter Trimble, contrary to the statutes in such case made and provided, and against the peace and dignity of the territory of Arizona." No demurrer was interposed to the indictment, but upon the trial there was objection to the introduction of any testimony against the defendant upon the ground of the insufficiency of the indictment to charge a public offense. The objection was overruled, the trial proceeded, and the jury rendered a verdict finding the defendant "guilty as charged." Motions for a new trial and in arrest of judgment were severally made and overruled. By the judgment of the court the defendant was pronounced guilty of the crime of rape, and sentenced to imprisonment for life in the territorial prison. She appeals from this judgment. Error is assigned, based upon the trial court's ruling on the defendant's objection to the introduction of any evidence, and also upon the overruling of the motion in arrest of judgment, which thus presents to us the question of the sufficiency of the indictment to support the judgment. It is contended on behalf of the appellant that the facts alleged do not charge her with the crime of rape, nor constitute any public offense.

Section 230 of the Penal Code defines rape to be "an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under either of the following circumstances," among which the first is, "where the female is under the age of seventeen years." The Penal Code further provides:—

"Sec. 27. All persons concerned in the commission of a crime, whether it be a felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising or encouraging children under the age of fourteen

years, lunatics or idiots, to commit any crime, or who, by fraud, contrivance or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed."

"Sec. 845. The distinction between an accessory before the fact and a principal, and principals in the first and second degree, in cases of felony, is abrogated; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, shall hereafter be prosecuted, tried and punished as principals, and no other facts need be alleged in any indictment against such an accessory than are required in an indictment against his principal."

By the ancient common law those persons only were considered principals who committed the overt act, while those who were present, aiding and abetting, were deemed accessories at the fact; and those who, not being present, had advised or encouraged the perpetration of the felony, were deemed accessories before the fact. Later the courts of England came to hold, as principals, all persons present, aiding and abetting, and these were called "principals of the second degree." 1 Russell on Crimes, 26. Such was the common law at the time of its adoption in the states of this country. The departure of our statute in the abolishment of these technical distinctions has effected a material change in the procedure for the conviction of wrong-doers. If there ever existed any basis in good reason for distinguishing between the moral turpitude of one whose will procures the commission of a crime, and the agent who willfully carries out the malignant purpose, there is now a clear recognition in the law of the principle that all persons whose will has contributed to the doing of a criminal act are equally guilty of that act, by whomsoever perpetrated. All are deemed chief actors, and the statute expressly provides that they "shall hereafter be prosecuted, tried and punished as principals, and no other facts need be alleged in any indictment against such an accessory than are required in an indictment against his principal." Being declared by the law to be principals, they must be indicted as principals, or not at all. *Ussellton v.*

People, 149 Ill. 612, 36 N. E. 952; *Coates v. People*, 72 Ill. 303; *Baxter v. People*, 3 Gilman, 368; *State v. Geddes*, 22 Mont. 68, 55 Pac. 919; *State v. Rowe*, 104 Iowa, 324, 73 N. W. 833; *People v. Outeveras*, 48 Cal. 19. By the statutes of some of the states, the aiding, abetting, or procuring a crime to be committed is made a substantive, independent offense, but such is not the law here. The defendant in this case was not charged directly as a principal in the crime of rape, nor were sufficient facts alleged in the indictment to show her guilty as a principal in that offense. Giving to the allegations against the defendant their fullest effect, it is charged, in substance, that she did aid, abet, and assist one Walter Trimble to commit rape; but there is a failure to affirmatively allege that such a crime was in fact committed by the said Walter Trimble. The indictment therefore charges no substantive offense punishable by the laws of this territory, and the court below erred in admitting evidence under it, and also in refusing to arrest the judgment.

The judgment of the district court will accordingly be reversed, the case ordered dismissed, and the defendant discharged.

Kent, C. J., and Sloan, J., concur.

[Civil No. 795. Filed March 20, 1903.]

[71 Pac. 944.]

E. HAYOIS et al., Defendants and Appellants, v. THE SALT RIVER VALLEY CANAL COMPANY, Plaintiff and Appellee.

1. WATER AND WATER-RIGHTS—IRRIGATION—CANAL—TRESPASS—BREAKING HEADGATES—REMEDY—EQUITY—INJUNCTION—PLEADING—COMPLAINT—SUFFICIENCY.—In an action by an irrigation company to restrain defendants from entering upon its canal, interfering with the headgates therein, and interfering in the operation and management of its said canal and headgates, a complaint alleging ownership and possession of an irrigating ditch in plaintiff, which

was used to convey water to plaintiff's stockholders and water-right holders, who were appropriators thereof, and had contracted with plaintiff for the carriage and delivery of all the water flowing in said canal; that plaintiff owned and maintained headgates for delivery of said water; that none of defendants were stockholders or water-right owners, nor had any contractual relations with plaintiff, nor any right, title, or interest in or to the canal, or waters flowing therein; that defendants had agreed to enter upon the canal and break the headgates, for the purpose of diverting water for their own use; that defendants had actually entered upon the canal, broken the headgates, and threatened to continue so to do; that the threatened acts of defendants would result in irreparable damage to plaintiff, against which it had no adequate remedy at law, sets forth all necessary facts to entitle plaintiff to the relief prayed.

2. EQUITY—PRACTICE—PLEADING—CROSS-BILL—NATURE—MUST BE GERMANE TO ORIGINAL BILL.—A cross-bill in equity must be germane to the original bill, and must not bring in new issues which would constitute the subject of an independent suit.

3. SAME—SAME—SAME—SAME—WATER AND WATER-RIGHTS—IRRIGATION—ACTION TO RESTRAIN INTERFERENCE IN OPERATION OF CANAL—CROSS-BILL TO DETERMINE PRIORITIES—DEMURRABLE.—In an action by an irrigation company brought for the purpose of restraining defendants from breaking the headgates and interfering with the management of plaintiff's canal, a cross-bill setting up that defendants were prior appropriators of water, and owners thereof, and praying that all parties claiming water should be made parties to the suit, with the view to the full adjudication of their respective rights to water, is demurrable as not germane to the original bill.

4. WATER AND WATER-RIGHTS—IRRIGATION—JUDGMENT—RESTRAINING INTERFERENCE IN OPERATION OF CANAL—EVIDENCE—SUFFICIENCY—EQUITY.—Evidence tending to prove that plaintiff owned and had been in undisputed possession and control for many years of a canal; that defendants had no proprietary interest therein, or contract relations with plaintiff, nor authority to enter upon the canal for any purpose; that prior to the commencement of this action the defendants, by mutual agreement, had entered upon said canal, broken various headgates therein, and taken therefrom water to which they claimed they were entitled by reason of former use and appropriation; that a repetition of said acts was threatened, involving injury and vexatious consequences to plaintiff company, which was then engaged in carrying water only for its stockholders and water-right owners is sufficient to sustain a judgment perpetually enjoining defendants from in any wise entering upon the canal of plaintiff or interfering with the headgates, or in any manner obstructing the plaintiff in the free and uninterrupted use and operation of its canal.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Edward Kent, Judge. Affirmed.

The facts are stated in the opinion.

E. W. Lewis, for Appellants.

Allegations of conclusions of serious and irreparable injury, apprehended and threatened, not supported by facts or circumstances tending to justify it, are insufficient. *McHenry v. Jewett*, 90 N. Y. 61.

The demurrer of plaintiff to the cross-complaint of defendants should have been overruled because the cross-complaint is germane to matters in the original complaint, seeks affirmative relief for defendants concerning matters in the original complaint, seeks a discovery of facts necessary to a proper determination of the suit, and seeks to obtain relief for all parties. Shipman on Equity Pleading, pp. 303, 304.

C. F. Ainsworth, for Appellee.

"Where the continued use or the threatened danger is such as to cause reasonable fear of irreparable injury, it is not essential that there should be actual damage or even contemplated violation of the plaintiff's right in order to entitle him to the protection of equity." *Lawson v. Menasha Woodware Co.*, 59 Wis. 393, 48 Am. Rep. 528, 18 N. W. 440; *Spear v. Cutter*, 5 Barb. 488; *Hart v. Mayor etc.*, 3 Paige, 214; Willard on Equity Jurisprudence, 383; *Livingston v. Livingston*, 6 Johns. Ch. 497, 10 Am. Dec. 353.

The matters set up in the cross-bill are not germane to the matter involved in the original bill or complaint. *Ex parte Railroad Co.*, 95 U. S. 221, 24 L. Ed. 355; *Fidelity etc. Co. v. Mobile etc. Ry. Co.*, 53 Fed. 850; *Shields v. Barrows*, 17 How. 145, 15 L. Ed. 163; *Ayres v. Carver*, 17 How. 593, 15 L. Ed. 180; *The Dove*, 91 U. S. 385, 23 L. Ed. 355; *Griffith v. Merritt*, 19 N. Y. 530; *Field v. Schieffelin*, 7 Johns. Ch. 251; *Buscher v. Volz*, 25 Ind. App. 400, 58 N. E. 269; *Las Vegas Water Co. v. Mayor etc. Co.*, 10 N. M. 6, 60 Pac. 208.

DAVIS, J.—This was an action brought by the appellee corporation against E. Hayois and seventeen other defend-

ants, owning lands lying under the Salt River Valley Canal, in Maricopa County, to enjoin and restrain said defendants from entering upon said canal, interfering with the headgates therein, or in any manner obstructing the appellee in the operation and management of its said canal and headgates. The complaint set forth by formal averments the ownership and possession of said canal in the plaintiff; that said canal was an irrigating ditch, used and occupied by the plaintiff for the sole purpose of conveying water from the Salt River to its stockholders and water-right holders, who were appropriators thereof, and had actual use for said water in the irrigation of their lands; that said water-right owners and stockholders had contracted with the plaintiff for the carrying and delivery of all of the water flowing in said canal, for their irrigation purposes aforesaid; that the plaintiff owned and maintained headgates at various points in said canal, which it used for the purpose of the delivery and economical distribution of the water therefrom; that none of the defendants were stockholders or water-right owners, nor had any contractual relations with the plaintiff, nor any right, title, or interest in or to the canal, or the waters flowing therein. The complaint further alleged an agreement among the defendants to enter upon the canal and break the headgates thereof, for the purpose of diverting water from the canal to their own use, the actual entry and breaking of said headgates by the defendants, and a threatened repetition of such breaking. There were also allegations that the threatened acts of the defendants would result in irreparable damage and injury to the plaintiff, against which it had no adequate remedy at law. Upon this complaint a temporary injunction was granted. The defendants interposed a general demurrer to the complaint, which was overruled. An answer was then filed by the defendants, together with a cross-complaint. In their cross-complaint the defendants undertook to set forth fully the history of the water situation in the Salt River Valley, — the different canals; their inception; their several modes of organization and incorporation; their methods of distribution of water; the control exercised by them; the matter of "water rights," so called; the long use and occupation by the defendants of their lands; how the water was originally obtained by, and furnished to, them; the present method; the depriva-

tion of their rights by the plaintiff company; their demand upon the plaintiff for water, and tender of payment therefor, and the refusal of plaintiff to furnish them with water unless the defendants would procure water-right deeds; the need of water for the cultivation of their lands; and the wrongful diversion thereof by the plaintiff, other canal companies, and other water users. The prayer of the cross-complaint was that the various canal companies in said valley, and every water user, might be made parties to said action, with the view to the full determination and adjudication therein of their respective rights to the use and control of the water of said valley, and for certain provisional relief pending the final adjudication of such rights. A demurrer by the plaintiff to this cross-complaint was sustained. Thereafter the defendants filed an amended answer, and the case went to trial upon the issues made by the complaint and amended answer. The district court rendered judgment perpetually enjoining the defendants from in any wise entering upon the canal of the plaintiff, or interfering with the headgates located therein, or in any manner obstructing the plaintiff in the free and uninterrupted use and operation of its said canal, and that plaintiff recover costs against the defendants. A motion for a new trial was denied, and the defendants have brought the case to this court for review.

Numerous errors are assigned by the appellants, but all of the questions which are essentially involved may be considered under the following three heads: (1) The overruling of the demurrer to the complaint; (2) the sustaining of the demurrer to the cross-complaint; and (3) the sufficiency of the evidence to sustain the judgment.

It is possible that the complaint in this action contained matter which, upon motion, could have been properly stricken out as surplusage; but, after a careful analysis of this pleading, we cannot agree with counsel for the appellants in his contention that it failed to set forth all the necessary facts required to entitle the plaintiff to the relief which it was seeking. The plaintiff's ownership and possession of the canal was alleged in a way to sufficiently show its right to the management and control thereof. The wrongful acts of the defendants in entering upon the canal and breaking the headgates therein, and the threatened repetition of the trespass,

were set forth in a manner which made clearly apparent the character of the injury which was impending, and no further averments than these were needed to enable the court to determine the inadequacy of a remedy at law. Three conditions are declared as essential to relief by injunction against trespass: First, admission or adjudication of plaintiff's rights; second, admission or adjudication of defendant's wrong; third, inadequacy of remedy at law. Formerly courts of equity rigidly abstained from interfering in any case prior to the establishment of the plaintiff's title to the possession, but in later times that is seldom required. Where the injury resulting or likely to result from the trespass is irreparable in its nature, either in respect of being compensated for pecuniarily, or because, from the circumstances, no estimate of the damages can be made with reasonable accuracy, the inadequacy of legal remedies is sufficiently apparent. Spelling on Injunctions and Extraordinary Remedies, 2d Ed., sec. 338. The commission of a mere trespass, as such, will not ordinarily be restrained. There must be some great vexation from continued trespasses, or some irreparable mischief which cannot easily be measured by money damages, to authorize the interference by injunction. *De Veney v. Gallagher*, 20 N. J. Eq. 33; *Lembeck v. Nye*, 47 Ohio St. 336, 24 N. E. 686, 8 L. R. A. 578, 21 Am. St. Rep. 828. There was here pleaded the threat of continued trespasses, involving in their natural consequences a multiplicity of suits, and the element of irreparable injury as well, so that the equitable jurisdiction of the court was properly invoked. The legal remedy is not adequate unless the injured party can, by a single action at law, have pecuniary damages which will constitute a complete and certain relief for the whole wrong,—a relief virtually as efficient as that given by a court of equity. This is the consensus of modern decisions of the highest authority.

2. The demurrer to the cross-complaint was based primarily upon the ground that the matters embraced in said cross-complaint were not germane to the plaintiff's action. It is well settled in equity practice that a cross-bill must be germane to the original bill; that is, it must be brought touching the very matters in question in the original bill, and must not bring in new issues which would constitute the subject of an independent suit. The new facts which it is proper for a defendant

to introduce into a pending litigation by means of a cross-bill are such, and such only, as it is necessary for the court to have before it, in deciding the questions raised in the original suit, to enable it to do full and complete justice to all the parties before it, in respect to the cause of action on which the complainant rests his right to aid or relief. If a defendant, in filing a cross-bill, attempts to go beyond this, and to introduce new and distinct matter, not essential to the proper determination of the matter put in litigation by the original bill, although he may show a perfect case against either the complainant or one or more of his co-defendants, his pleading will not be a cross-bill, but an original bill. 5 Ency. of Plead. & Prac., p. 640, and cases there cited. The plaintiff's action was brought for the purpose of restraining the defendants from breaking the headgates and interfering with the management of its canal. To the determination of this controversy all questions relating to the ownership of the water were wholly immaterial. It was the ownership of the canal, and not the water, which constituted the basis of the plaintiff's right to the relief it was asking. A determination most favorable to the defendants of the various questions sought to be injected by the cross-complaint would have failed to show that they had any interest in the canal, or lawful warrant for interfering with the management and control thereof; and, since the settlement of these questions could have no possible bearing upon the plaintiff's cause of action, they were not matters which could be properly adjudicated in this suit. As was said by the learned judge of the trial court in his opinion, "Whether they [defendants] are the oldest settlers in the valley, whether they are the first appropriators of water from the Salt River, whether they have an absolute and unquestioned right to the water, no one has the right to forcibly break open the headgates of the canal, or divert water therefrom, in interference with the established rules and regulations of the canal company, because he is not getting the water to which he may be entitled. To hold otherwise, or to allow each user of water to judge for himself of when and how he may use and divert water carried in a canal, and how much he may use, and to exercise such judgment by opening this or that headgate, in opposition to the canal company's management, would be productive of such confusion, waste, ill feeling,

and probable violence as to make it impossible for a court to sanction it, on the ground of public policy alone, if on no other ground." The matters contained in the cross-complaint had no relevancy to the plaintiff's cause of action, and the trial court properly sustained the demurrer thereto.

3. There was evidence on the trial tending to prove that the plaintiff was the owner of the Salt River Valley Canal, and had been in undisputed possession and control thereof for many years next preceding the commencement of this action; that the defendants had no proprietary interest therein, or contract relations with the plaintiff, nor authority to enter upon the canal for any purpose; that prior to the commencement of this action the defendants, by mutual agreement, had entered upon said canal, broken various headgates therein, and taken therefrom water to which they claimed they were entitled by reason of former use and appropriation; that a repetition of said acts was threatened, involving injury and vexatious consequences to the plaintiff company, which was then engaged in carrying water only for its stockholders and water-right holders. The evidence presented by the plaintiff upon these several points was practically uncontradicted, and is, we think, amply sufficient to sustain the judgment.

We find no error in the record, and the judgment of the district court is affirmed.

Sloan, J., and Doan, J., concur.

[Civil No. 798. Filed March 20, 1903.]

[71 Pac. 913.]

GILA VALLEY, GLOBE, AND NORTHERN RAILROAD
COMPANY, a Corporation, Defendant and Appellant, v.
GILA COUNTY, Plaintiff and Appellee.

1. REPLEVIN—PLEADING—GENERAL DENIAL—GENERAL DEMURRER—NOT SUBJECT TO.—As a general denial in replevin puts in issue every fact stated in the complaint necessary to sustain plaintiff's cause of action, it is error to sustain a general demurrer thereto.

2. APPEAL AND ERROR—AMOUNT IN CONTROVERSY—JURISDICTION—REPLEVIN.—The supreme court has jurisdiction on appeal from a judgment in replevin, where defendant was in possession at the time suit was commenced, filed a general denial, and only asked judgment for its costs, there being nothing in the record on appeal to show that the property was out of defendant's possession, and the form of judgment indicating that it was not in plaintiff's possession, the matter in dispute being necessarily the property itself, which was valued at \$448.10.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Gila, F. M. Doan, Judge. Reversed.

The facts are stated in the opinion.

Frank W. Burnett, for Appellant.

The demurrer was general to the entire answer; hence if either defense was good, the ruling was erroneous. *Stoddard v. Treadwell*, 26 Cal. 294.

The general denial was sufficient, and put the plaintiff to proof of his demand. It is equivalent to the general issue at common law. *Fay v. Cobb*, 51 Cal. 313.

George J. Stoneman, District Attorney, for Appellee.

DAVIS, J.—This was an action in replevin, brought by the appellee, as plaintiff in the court below, against the Gila Valley, Globe, and Northern Railway Company, to recover from the possession of said company five crates of iron vault furniture. The amended complaint set forth that the plaintiff was the owner and entitled to the possession of said property, that the same was wrongfully detained by the defendant company, that the actual value of said property was \$448.10, and contained other averments which sufficiently met the requirements of the statute. To this amended complaint the defendant answered, pleading a general denial of each and every allegation thereof except that the defendant was a corporation. The answer also contained another defense, setting up special matter, which, in the view we take of the case, it will not be necessary to consider. The defendant only prayed judgment for its costs. The plaintiff interposed a general demurrer to the answer, which was sustained by the court, and leave

granted the defendant to file an amended answer. Thereafter, the defendant having declined and refused to amend its answer, the plaintiff submitted a motion for a judgment in its favor on the pleadings, which motion was granted. It was thereupon "ordered and adjudged that the plaintiff have and recover from the defendant the personal property described in its complaint [description], and that plaintiff also recover from defendant its costs and disbursements, amounting to the sum of \$22.76." The defendant appeals from this judgment.

The appellant claims that the trial court erred (1) in sustaining the demurrer to the answer, and (2) in rendering judgment against the defendant on the pleadings. The demurrer was general to the entire answer; hence, if either defense was good, the ruling was erroneous. This action, formerly termed "claim and delivery" in our statute, has been held to be only a modification of the common-law remedy of replevin. *Carroll v. Byers*, 4 Ariz. 158, 36 Pac. 499; *Levy v. Leatherwood*, 5 Ariz. 244, 52 Pac. 359. But the peculiar common-law pleadings in replevin do not exist under our practice. Where the code system of pleading prevails, the rule is almost universal that a general denial in a replevin case puts in issue every fact stated in the complaint necessary to sustain the plaintiff's cause of action. *Glazer v. Clift*, 10 Cal. 303; *White v. Gemeny*, 47 Kan. 741, 28 Pac. 1011, 27 Am. St. Rep. 320; *Loomis v. Foster*, 1 Mich. 165; *Oester v. Sitlington*, 115 Mo. 247, 21 S. W. 820; *Aultman v. O'Dowd*, 73 Minn. 58, 75 N. W. 756, 72 Am. St. Rep. 603; *Aultman v. Stichler*, 21 Neb. 72, 31 N. W. 241; *Bailey v. Swain*, 45 Ohio St. 657, 16 N. E. 370; *Chamberlin v. Winn*, 1 Wash. 501, 20 Pac. 780; *Timp v. Dockham*, 32 Wis. 146. And we find nothing in the requirements of our local procedure that would be inconsistent with the application of such rule. Unquestionably, therefore, since there was contained in the answer the defense of the general denial, the pleading, as a whole, could not be considered as obnoxious to a general demurrer. We think the court erred in sustaining the demurrer to the answer, and it follows, for the same reason, that the judgment rendered on the pleadings was also erroneous.

Counsel for the appellee has suggested the question of our jurisdiction to review this case on appeal. It is urged that,

because the defendant failed to demand a return of the property, or to make any claim for damages, but only asked judgment for its costs, the amount involved in the appeal is less than one hundred dollars. Under the provisions of our replevin statute the defendant may, in his answer, demand a return of the property, and assert a claim of damages for the unlawful replevying thereof, but there would be no occasion for any such demand or claim unless the defendant was deprived of the possession of the property. In the case before us there is nothing in the record to show that the property was out of the defendant's possession, and the form of the judgment would indicate that the possession thereof was not, at the time, in the plaintiff. The general denial in this case put in issue both the ownership and the right to the possession of the property, and, the case having apparently gone to judgment with the property in the defendant's possession, the "matter in dispute" was necessarily the property itself, the value of which was alleged in the complaint at \$448.10.

For the errors pointed out, the judgment will be reversed and the cause remanded for a new trial.

Kent, C. J., and Sloan, J., concur.

[Civil No. 800. Filed March 20, 1903.]

[71 Pac. 925.]

THE W. H. TAGGART MERCANTILE COMPANY, a
Corporation, Plaintiff and Appellant, v. W. W. CLACK,
Defendant and Appellee.

1. TRIAL — JURY — INTERROGATORIES — SUBMISSION — DISCRETIONARY — REV. STATS. ARIZ. 1901, PAR. 1427, CONSTRUED AND HELD DIRECTORY.—Paragraph 1427, *supra*, providing that "in all cases, whether law or chancery, where more than one material issue of fact is joined, interrogatories may, under proper instructions, be submitted to the jury by the court, in writing, and they shall be answered by the jury: provided, that such interrogatories shall be plain, terse, direct, and simple, shall each be confined to a single question of fact, and shall be so framed as to be answered by yes or no and shall be so answered," is directory only, and the matter of the submission of interrogatories under it in any case is left to the discretion of the trial court.

2. ACTION TO QUIET TITLE—EQUITY—TRIAL—JURY—INTERROGATORIES—FINDINGS—ADVISORY—ERROR—CANNOT BE BASED UPON—REV. STATS. ARIZ. 1901, PAR. 1427, CONSTRUED—HENRY V. MAYER, 6 ARIZ. 103, 53 PAC. 590; EGAN V. ESTRADA, 6 ARIZ. 248, 56 PAC. 721, FOLLOWED.—Where, in an equity suit to quiet title to a certain mining claim, the court in accordance with the provisions of statute, *supra*, submitted certain interrogatories concerning disputed issues of fact, error could not be predicated on the form in which the interrogatories were propounded, since the answers to the questions submitted could at most be only advisory.
3. APPEAL AND ERROR—EVIDENCE—CONFLICTING—FINDING—WILL NOT BE DISTURBED.—Where the evidence is conflicting, and there is any evidence to support a finding, it will not be disturbed on appeal.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Mohave. R. E. Sloan, Judge. Affirmed.

The facts are stated in the opinion.

E. E. Ellinwood, for Appellant.

E. M. Sanford, for Appellee.

DAVIS, J.—The appellant corporation commenced an action in the court below against W. W. Clack to quiet its title to a certain mining claim in the Wallapai Mining District, Mohave County, known as the "Silver King." The defendant filed an answer and cross-complaint to the suit, in which he denied that the plaintiff was the owner or entitled to the possession of said mining claim, but alleged that the same had become forfeited by reason of the failure of the plaintiff to make the annual expenditure thereon required by law, and that on January 9, 1901, when the Silver King ground was open to relocation, the defendant had entered upon and located the same, in his own name, as the "Unit Mining Claim." The defendant prayed that his title be determined and quieted as against the claims of the plaintiff. Upon the trial of the case, the only question in contest was as to whether there had been a failure by the plaintiff to perform one hundred dollars of assessment-work on the Silver King for the year 1900, so as to make the claim open to relocation on January 9, 1901. The record shows that the court called to its aid a jury of twelve men, and submitted to them certain

issues, in the form of interrogatories, directed to the ascertainment of the extent and value of the labor done and improvements made upon the Silver King mining claim for the year 1900, and that upon the issues thus submitted the jury found against the plaintiff. The court followed the findings of the jury, and entered a decree in favor of the defendant on his cross-complaint, quieting his title to the Unit mining claim against all claims, demands, or pretensions of the plaintiff thereto. From this judgment and decree the plaintiff appeals.

Error is sought to be predicated upon the form of the interrogatories which were submitted to the jury, it being claimed that the same were not plain, terse, direct, and simple, nor confined to a single question of fact, nor such as could be answered by yes or no. Our statute provides that "in all cases, whether law or chancery, where more than one material issue of fact is joined, interrogatories may, under proper instructions, be submitted to the jury by the court in writing, and they shall be answered by the jury; provided, that such interrogatories shall be plain, terse, direct and simple, shall each be confined to a single question of fact, and shall be so framed as to be answered by yes or no, and shall be so answered." Rev. Stats., 1901, par. 1427. This statute is directory only, and the matter of the submission of interrogatories under it, in any case, is left in the discretion of the trial court. But, where a case is one of equitable jurisdiction solely, the court is not bound to submit any issues of fact to a jury, and, if it does so, it is only for the purpose of "enlightening its conscience, and not to control its judgment." In such a case the court is at liberty to disregard the verdict and findings of the jury, either by setting them or any of them aside, or by letting them stand, and allowing them more or less weight in its final hearing and decree, according to its own view of the evidence in the case. *Improvement Co. v. Bradbury*, 132 U. S. 509, 10 Sup. Ct. 177, 33 L. Ed. 433; *Perego v. Dodge*, 163 U. S. 160, 16 Sup. Ct. 971, 41 L. Ed. 113; *Henry v. Mayer*, 6 Ariz. 103, 53 Pac. 590; *Egan v. Estrada*, 6 Ariz. 248, 56 Pac. 721. Inasmuch as the answers to the interrogatories which the court submitted to the jury in this case could, at most, only be advisory, and the decree to be entered would have to proceed from the court's own judg-

ment respecting the facts, no error can be predicated upon the form in which the interrogatories were propounded.

It is also urged that the judgment is not sustained by the evidence. The theory of the defendant's case was that the Silver King ground was open to relocation on January 9, 1901, when he entered thereon and located it as the "Unit Claim"; and, in order to prevail in the action upon this theory, it devolved upon him to show that the plaintiff had failed to do the annual work upon the Silver King for the year 1900 which the law requires to be done upon an unpatented mining claim. The evidence showed that the plaintiff had attempted a compliance with the statute by making an extension upon said claim of what was known as the "Leonard Tunnel." A large number of witnesses were examined by the respective parties touching the extent and value of this work, and there was a conflict in the evidence as to whether or not the same was worth the sum of one hundred dollars. It was the finding of the court "that, during the year 1900, the plaintiff did not do or perform one hundred dollars' worth of labor and improvements upon said mining claim," and, there being evidence to support the finding, it will not be disturbed on appeal. This being the pivotal fact upon which the case turned, the evidence must be held to sustain the judgment.

No other errors are assigned, and the judgment of the district court is affirmed.

Kent, C. J., and Doan, J., concur.

[Civil No. 805. Filed March 20, 1903.]

[71 Pac. 917.]

GEORGE B. UPTON et al., Defendants and Appellants, v.
ALBERT WEISLING, Plaintiff and Appellee.

1. CONVEYANCE — ACTION TO SET ASIDE — FRAUD — PLEADING — ALLEGATIONS — SUFFICIENCY — MINES AND MINING. — In an action to set aside a conveyance of plaintiff's one-third interest in a mining claim, the complaint alleged specific fraudulent acts on the part of plaintiff's co-owners, and that defendant, the purchaser, was a party to and

cognizant of all the fraudulent acts, misrepresentations, and deceit done, said, and practiced upon said plaintiff by his co-owners and parties interested therein, and that by reason of such fraudulent act plaintiff was induced to make the conveyance. *Held*, that the complaint stated a cause of action against the purchaser, and his demurrer thereto was properly overruled.

2. APPEAL AND ERROR—ASSIGNMENTS OF ERROR—FINDINGS OF FACT—

MERE EXPRESSIONS OF COURT'S OPINION NOT REVIEWABLE.—Error predicated upon alleged findings which are mere expressions taken from the trial court's opinion, and not the findings of fact, which were signed by the judge and became the basis of the judgment, will not be reviewed.

3. PARTNERSHIP—JOINT VENTURES—SALE OF PROPERTY—FRAUD—

SECRET PROFITS—LIABILITY OF PARTNERS—MINES AND MINING.—Defendants, co-owners of a mining claim, with plaintiff, represented that defendant L. was to purchase the claims in controversy for eight thousand dollars, and, relying upon representations, plaintiff conveyed his interest to defendant L. for \$2,666. As a matter of fact, L. had transferred to defendants, plaintiff's co-owners, in addition to their proportionate share of the eight thousand dollars, twenty thousand dollars of the capital stock of a corporation organized to operate the mine. *Held*, that the relations of plaintiff and his co-owners were of such mutual and confidential nature as required of them full disclosure of all the facts pertaining to the consideration for the sale, and that equity requires that plaintiff should receive his proportionate share of the capital stock issued to his co-owners.

4. SAME—SAME—SAME—SAME—SAME—LIABILITY OF PURCHASER—

MINES AND MINING.—Plaintiff was induced by his co-owners to convey his one-third interest in certain mining property, they representing to him that the entire property was to be sold for eight thousand dollars, whereas in fact, by a secret agreement with the purchaser, they were to receive, in addition to their share of the purchase price, twenty thousand dollars in capital stock of a corporation to be organized to work said property. While defendant purchaser had knowledge of the fraud practiced upon plaintiff by his co-owners in misrepresenting the purchase price, he did not participate in the deception, nor did their concealment enable him to get the property at any better price, or benefit him in any wise. *Held*, that the relation of defendant purchaser to plaintiff was different from that of the co-owners, and a judgment against him for a proportionate share of the stock issued was unwarranted.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. Richard E. Sloan, Judge. Modified.

The facts are stated in the opinion.

Frank W. Ellis, and Herndon & Norris, for Appellants.

There is no construction to be placed upon the language of the complaint that would justify a claim that it designated any act of fraud on Lamb's part; the general allegation that he was cognizant of all the fraudulent acts and misrepresentations of Upton and Hatfield is no charge of any fact against him. *Estep v. Armstrong*, 69 Cal. 536, 11 Pac. 132; *Kent v. Snyder*, 30 Cal. 667; *Castle v. Bader*, 23 Cal. 76; *Ockendon v. Barnes*, 43 Iowa 615; *Butler v. Viele*, 44 Barb. 166; *Beaubien v. Beaubien*, 23 How. (U. S.) 190, 16 L. Ed. 484; *Leavenworth L. and G. R. Co. v. Commissioners of Douglass County*, 18 Kan. 169.

When a case is tried by the court and there are findings of fact, such findings must support the judgment. *Kinsey v. Green*, 51 Cal. 379; *Swift v. Muygridge*, 8 Cal. 445; *Majors v. Cowell*, 51 Cal. 478; *Northern Pacific R. R. Co. v. Reynolds*, 50 Cal. 90; *Wood v. Larue*, 9 Mich. 158.

Robert E. Morrison, and J. H. Collins, for Appellee.

If equity appears in plaintiff, however defectively pleaded, the demurrer will be overruled; it is sufficient if the main facts and incidents which constitute the fraud against which relief is desired shall be fairly stated, so as to put the defendant upon his guard and apprise him of what answer may be required of him. *Kelley v. Boettcher*, 85 Fed. 55, 29 C. C. A. 14; *United States v. American Bell Tel. Co.*, 128 U. S. 356, 9 Sup. Ct. 90, 32 L. Ed. 458; *Harding v. Handy*, 11 Wheat. 103, 6 L. Ed. 429; *St. Louis v. Knapp Co.*, 104 U. S. 658, 26 L. Ed. 883.

Where collusion and combination to cheat and defraud are charged, a demurrer will not lie; they must answer fully. *Shearer v. Shearer*, 50 Miss. 113.

While a purchaser dealing at arm's length is not liable in damages for remaining silent as to any fact affecting the value of the property, yet if he says or does anything, however slight, to prevent inquiry or to influence the seller to part with the property for less than its value, the transaction is vitiated by fraud. *Laidlaw v. Organ*, 2 Wheat. 178, 4 L. Ed. 214; *Livingston v. Peru Iron Co.*, 2 Paige Ch. 390.

The co-owners of mines occupy such confidential relations as to require full disclosures of all facts which affect the value of the mines to their associates. *Daniel v. Brown*, 33 Fed. 849; *Gruber v. Baker*, 20 Nev. 453, 23 Pac. 858, 9 L. R. A. 302; *Curran v. Campion*, 85 Fed. 67, 29 C. C. A. 26; *Donovan v. Campion*, 85 Fed. 71, 29 C. C. A. 30.

DAVIS, J.—On the thirtieth day of April, 1901, Albert Weisling commenced an action in the district court of Yavapai County against George B. Upton, Ben Hatfield, Garrett E. Lamb, and the Oro Grande Mining Company. His amended complaint, covering many pages of the transcript, sets forth, in substance: An agreement alleged to have been entered into between the plaintiff and the defendants George B. Upton and Ben Hatfield on or about September 20, 1900, by which the three were to become associated in the location, development, and sale of mining properties; that by the terms of said agreement such properties were to be acquired jointly by the said Upton, Hatfield, and the plaintiff, and all were to share equally therein, and in the benefits, profits, and losses of the venture; that in pursuance of their said agreement the said parties located and became co-owners of six certain mining claims, situate in the Black Rock Mining District, in Yavapai County; that the plaintiff was ignorant and inexperienced in the business of selling mines, and without knowledge of the value of mines, but that the said Upton was a person of great skill, knowledge, and experience in mining, and as a dealer in mining properties; that the plaintiff fully trusted and relied upon his associates, Upton and Hatfield, and believed that they would, in all things connected with said enterprise, regard and protect his interests equally with their own, and that no unfair advantage would be taken of him by either of them; that the said Upton and Hatfield, contriving and intending to injure, cheat, and defraud the plaintiff, and to deprive him of his just share in the value of the aforesaid mining claims, unlawfully, and in violation of their duty to the plaintiff, and of the trust and confidence reposed by him in them, artfully concealed from him certain material facts relating to the value of said properties, and their own purposes concerning the development and sale thereof, to the end that the plaintiff might be induced to part with his interest in said property

for a grossly inadequate consideration; that, through the influence and persuasion of Upton and Hatfield, the plaintiff was induced to authorize and consent to a sale of all of the aforesaid mining claims at the price of ten thousand dollars; that no sale, however, was effected on this basis; that the plaintiff was informed by the said Upton and Hatfield that the defendant Garrett E. Lamb, a resident of Iowa, was considering the purchase of said properties, but would not agree to pay more than the sum of eight thousand dollars for the same; that no better price than this could be obtained from any source, and that they were willing and anxious to sell at this price; that the plaintiff, being ignorant of the real and prospective value of said properties, and relying upon the friendship, superior judgment, and good faith of his associates, Upton and Hatfield, consented that said properties might be sold to said Lamb for the sum of eight thousand dollars, the proceeds to be equally divided between the three owners; that, in pursuance of a pretended agreement of sale on these terms, the plaintiff, on January 3, 1901, executed to the said Lamb a bond or option on plaintiff's one-third interest in the said mining claims at the price of \$2,666, and simultaneously therewith executed a deed therefor, and deposited the same in escrow; that on March 18, 1901, the said Lamb, in compliance with the option agreement, paid to the plaintiff the sum of \$2,666, took said deed out of escrow, and placed it of record. The complaint further sets forth that, notwithstanding their representations to the contrary, the said defendants Upton and Hatfield did not sell or dispose of their interest in said mining claims, but that they are still part owners therein; that their pretense of selling was in furtherance of a formed design and fraudulent purpose to deceive and defraud the plaintiff, and to secure to themselves and to the said Lamb the plaintiff's interest in said property; that, at the time and prior to the execution of the option and deed by the plaintiff, the said mining claims were worth in excess of two million dollars; that the defendants Upton and Hatfield then knew that such was their value; that the defendant Lamb was a party to, and cognizant of, all the fraudulent acts, misrepresentations, and deceit done, said, and practiced by Upton and Hatfield against the rights and property of the plaintiff, and that all three of said defendants were acting in collusion to

cheat and defraud the plaintiff of valuable property, and to obtain the same for a ridiculously small and grossly inadequate consideration; that, solely, by reason of the fraud, deceit, collusion and wrongs of the defendants Upton, Hatfield, and Lamb, the plaintiff was induced as aforesaid to convey away his interest in said mining claims; that the Oro Grande Mining Company, through its agents and officers, assert some right or title to said properties, and, in conjunction with its co-defendants herein, works, operates, and controls the same. The plaintiff, offering to return the \$2,666 received as a consideration for said conveyance, and to do all manner of equity required of him, prayed judgment for the rescission or cancellation of the deed executed by him for said mining claims, and that he be restored to his one-third interest therein. He also asked for such other and further relief as he might in law or equity be entitled to.

The defendants George B. Upton and Ben Hatfield, by their answer, denied generally and specifically all allegations of said complaint which charged them with any fraud, deceit, collusion, or wrong-doing against the plaintiff. The defendant Garrett E. Lamb interposed, and urged a general demurrer to the complaint, which was overruled. There was also filed in his behalf a separate answer, which contains specific denials of all averments of the complaint in any way imputing to him fraudulent collusion with Upton and Hatfield, or charging him with fraudulent conduct against the plaintiff. There was a separate answer by the Oro Grande Mining Company, asserting full title to said mining property derived by purchase in good faith. The evidence at the trial tended to establish, among other things, that on January 3, 1901, when the plaintiff, Weisling, executed his option and deed for the sale of his one-third interest in said mining claims to Lamb at the price of \$2,666, the defendants Upton and Hatfield had already entered into an option agreement with Lamb, by the terms of which they were to receive, as consideration for the transfer of their two-third interest, the sum of \$5,333, and, in addition thereto, one third of the capital stock of a corporation to be organized for the purpose of taking over the title to said mining properties and developing the same; that thereafter the said Upton and Hatfield received from Lamb the said sum of \$5,333, and

made a deed of their said interest to him, as trustee; that Lamb thereupon caused to be organized the Oro Grande Mining Company, a corporation with a capital stock of sixty thousand dollars, and deeded to said company the aforesaid mining claims; that twenty thousand dollars of the capital stock of said company was delivered to Upton and Hatfield, in compliance with their agreement with Lamb. The court below, in its judgment, did not grant the plaintiff relief to the extent of ordering a rescission of the deed executed by him to Lamb, but entered a decree requiring the defendants Upton, Hatfield, and Lamb, to deposit in court for the plaintiff's benefit one third of twenty thousand dollars of the capital stock of the Oro Grande Mining Company, or, in default thereof, that the plaintiff recover judgment against them for the face value of the said stock. The case was ordered dismissed as to the defendant company. The defendants Upton, Hatfield, and Lamb have taken an appeal from the judgment and decree so entered.

The first assignment of error is made in behalf of Lamb alone, and is based upon the overruling of his demurrer to the complaint. It is claimed that, as to this defendant, the allegations of fraud made by the complaint are too general, and only averments of legal conclusions. We think that counsel have misconceived the scope and effect of the complaint as it relates to the defendant Lamb. Clearly, there is a direct and concise statement of the facts connecting him with all the misrepresentations and deceit alleged in the complaint against Upton and Hatfield. It is sufficient if the main facts or incidents which constitute the fraud against which relief is desired shall be fairly stated, so as to put the defendant upon his guard and apprise him of what answer may be required of him. Story's Equity Pleading, sec. 252.

It is claimed that the court erred in its findings of fact, but the alleged findings upon which error is sought to be predicated are mere expressions taken from the trial court's opinion, and not the findings of fact which were signed by the judge and became the basis of the judgment. These latter are contained in the record, but, through some inadvertence, appear to have escaped the attention of counsel for appellants. They show that, upon the material and disputed points in the case, the trial court found as follows: "That on or about the third

day of January, 1901, plaintiff herein executed an option to the defendant Garrett E. Lamb, granting the said Garrett E. Lamb therein the right to purchase his one-third interest in and to said property for the sum of \$2,666, and at the same time executed a deed to said one-third interest in and to said property to said defendant Garrett E. Lamb, and deposited the same in escrow to be delivered to said Lamb in the event that the latter should pay to plaintiff the purchase price in said option named, to wit, the sum of \$2,666. That prior to said 3d day of January, 1901, and prior to the execution of said option and deed, said plaintiff authorized defendant George B. Upton to negotiate a sale of said property upon the agreed price of ten thousand dollars for the whole thereof. That, at the time of the execution of said option and deed, defendants Upton and Hatfield represented to plaintiff that they were willing and desirous of selling the property herein described for the sum of eight thousand dollars, and that the defendant Garrett E. Lamb was willing to purchase the same for said sum of eight thousand dollars, and that no further sum would be paid by said Lamb for said property, but that the said sum of eight thousand dollars was all that could be had for the same. That plaintiff herein was induced and persuaded to give said option, and to execute said deed for the sum of \$2,666, by reason of said representations, so made as aforesaid by said Upton and Hatfield, that the sum of eight thousand dollars was the full purchase price of said property, and that no greater or further sum or sums could be had from the purchaser, said Garrett E. Lamb. That subsequently, and on the eighteenth day of March, 1901, said defendant Garrett E. Lamb paid to the plaintiff herein the said sum of \$2,666, and obtained the said deed, placed as aforesaid in escrow, and had the same recorded in the office of the county recorder of said county. That, prior to the execution by plaintiff to said Lamb of said option and deed, the defendants Upton and Hatfield had entered into an agreement with said defendant Lamb, wherein it was agreed that said defendants Upton and Hatfield should convey to a corporation thereafter to be formed all their right, title, and interest in and to said property, in consideration of the sum of \$2,666 to be paid to each of said defendants, and in addition thereto were to receive one third of the capital stock of said corporation. That, in compliance

with the said agreement, said defendant Garrett E. Lamb thereafterwards pay to said Upton and to said Hatfield the sum of \$2,666 each, and did thereafterwards cause to be organized a corporation known as the 'Oro Grande Mining Company,' with a capital stock of \$60,000, and did thereafterwards cause to be issued to said Upton and to said Hatfield, as a further consideration for said conveyance, the sum of twenty thousand dollars of the capital stock of said Oro Grande Mining Company, fully paid. That, at the time plaintiff gave his said option and deed to said defendant Lamb, he did not know that said Upton and Hatfield were to receive any other consideration for their conveyance of their interests in said property than the money consideration hereinbefore set forth, nor did he, at the time when said defendant Garrett E. Lamb paid the plaintiff the purchase price agreed upon for plaintiff's interest, have any knowledge that said Upton and Hatfield were to receive any other or different consideration than said money consideration hereinbefore set forth. That by reason of said concealment by said Upton and said Hatfield of the fact that they were to receive any additional consideration than said money consideration for said conveyance of their said interests, and by reason of the actual representations made to said plaintiff by said Upton and Hatfield that the full purchase price for the entire property was to be the sum of eight thousand dollars, and that no further sum or sums could be had therefor from said Lamb, the said plaintiff was persuaded, induced, and influenced to reduce the selling price of his one-third interest in and to said property from the sum of \$3,333.33 to the said sum of \$2,666. That the said Garrett E. Lamb knew at the time of the execution of said option and deed, and at the time of the completion of the purchase of plaintiff's one-third interest, of said concealment and misrepresentations on the part of said Upton and Hatfield. The court further finds that no other or further wrong, deceit, concealment, or misrepresentation was practiced upon said plaintiff by any of the defendants herein than that above found. The court further finds that there are stockholders of the Oro Grande Mining Company, one of the defendants herein, who had no knowledge of the concealment, deceit, and misrepresentations hereinbefore set forth." All of the above findings were based upon the evidence presented at the trial,

and we think that no one of them is subject to the objection that it is not fairly sustained by proofs.

It is further urged that the judgment as rendered is not supported either by the evidence or the findings, and particularly that the state of the case did not warrant any judgment against the defendant Lamb. The evidence did not sustain all of the allegations of fraud which the complaint contained, and it is to be observed that the trial court only declared, by its finding, that misrepresentation and concealment had been practiced by the defendants in relation to the price which could be obtained for the joint property. It is clear to us from the evidence that the relations between the plaintiff and his co-owners were such as required of them full disclosure of all the facts pertaining to the consideration for the proposed sale. These relations were of a mutual and confidential character, and the plaintiff was relying and acting altogether upon the good faith of his two associates. The *status* was not that of parties dealing with a third "at arm's length." So that we have no hesitancy in saying that the plaintiff, having been induced by the defendants Upton and Hatfield to part with his interest in the joint property upon their representation that the price of eight thousand dollars was to be obtained for the whole thereof, it was right and equitable that he should be decreed to have his proportionate share of the twenty thousand dollars stock received as consideration by said defendants in excess of that sum. But, while approving the judgment of the court below in so far as it relates to the defendants Upton and Hatfield, we do not think there is justification, either in the evidence or the findings of the court, for subjecting the defendant Lamb to the terms imposed against Upton and Hatfield. As the purchaser, his relation to the transaction was different from theirs, and the duty which he owed to the plaintiff dissimilar. The finding was merely that he had knowledge of the misrepresentation and concealment on the part of Upton and Hatfield concerning the purchase price. The court did not find that he participated in the deception. It does not appear that the fraud practiced upon the plaintiff by Upton and Hatfield enabled Lamb to get the property at any better price, or that he was in any wise benefited thereby. Not having received any portion of the twenty thousand dollars stock, he could

not surrender the same, and we think there was error in making him subject to the provisions of the decree.

The judgment will be modified to the extent of relieving the defendant Lamb from its operation, and in all other respects will be affirmed.

Kent, C. J., and Doan, J., concur.

[Civil No. 808. Filed March 20, 1903.]

[71 Pac. 930.]

GEORGE W. SEAVERNS, Defendant and Appellant, v.
MARTIN COSTELLO, Plaintiff and Appellee.

1. **APPEAL AND ERROR—EVIDENCE—OBJECTIONS—PRESUMPTION—INCOMPETENT EVIDENCE DISREGARDED WHERE COMPETENT EVIDENCE SUPPORTS JUDGMENT—UNITED STATES v. MARKS, 5 ARIZ. 404, 52 PAC. 773, FOLLOWED.**—Where the record shows that objections were interposed on the trial to the admissibility of certain documents offered in evidence, and fails to show what of said proffered evidence was considered by the court, or what excluded, in reaching its decision, it will be presumed that the incompetent evidence was disregarded, if the competent evidence in the record sustains the judgment.
2. **TAXES AND TAXATION—TAX-COLLECTOR'S DEED—VALIDITY—MUST COMPLY WITH REQUIREMENTS OF STATUTE—REV. STATS. ARIZ. 1887, PAR. 2701, CONSTRUED.**—A tax-collector's deed containing no recital of the name of the person, firm, company, or corporation assessed, and from whom the taxes were due, nor any statement that the same was "unknown," is void on its face for want of compliance with the requirements of paragraph 2701, *supra*.
3. **SAME—SAME—VOID—NOT PRIMA FACIE EVIDENCE OF TITLE—NOT BASIS FOR AFFIRMATIVE RELIEF.**—A void tax-collector's deed is not even *prima facie* evidence that the title of the owner to the premises assessed is impaired, and cannot offer basis for affirmative relief.
4. **MINES AND MINING—ACTION TO RECOVER CLAIM—DEFENSE—STATUTE OF LIMITATIONS—ADVERSE POSSESSION—EVIDENCE—SUFFICIENCY—REV. STATS. ARIZ. 1887, PARS. 2229, 2328, CITED.**—In an action to recover a mining claim, where defendant pleaded the statute of limitations, in compliance with paragraphs 2299 and 2328, *supra*, setting up adverse possession for ten years, and offered evidence to support

the claim of adverse possession, that he had been upon the premises, supposed that he owned it, having the tax-title deed from the county, but that he had done nothing thereon, except pay the taxes for ten years, such evidence is too meager and indefinite to establish the "peaceable and adverse possession" without which the plea of limitations is unavailing.

5. LIMITATIONS—PLEADING.—The pleading of the statute of limitations does not dispense with the necessity of also pleading all facts essential to bring the party within the provisions of the statute, when the existence of those facts is not shown by the pleading of the opposite party.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. F. M. Doan, Judge. Affirmed.

The facts are stated in the opinion.

English & Bowman, for Appellant.

James Reilly, and F. W. Goodbody, for Appellee.

The tax-deed is void on its face, because it shows an absolute want of compliance with the command of paragraphs 2640, 2649, and 2652 of the Revised Statutes of 1887, not having been assessed to any owner known or unknown. *Baird v. Benlisa*, 142 U. S. 664, 12 Sup. Ct. 323, 35 L. Ed. 1151; *Northern Pacific Ry. Co. v. Galvin*, 85 Fed. 811; *City of St. Louis v. Wenneker*, 145 Mo. 230, 68 Am. St. Rep. 561, 47 S. W. 105; *Hancock v. Stackpole*, 40 Fla. 362, 24 South. 914, 45 L. R. A. 814.

Again, the deed is void because it does not contain the name of grantor ("owner, known or unknown"), as commanded by paragraph 2701 of the Revised Statutes of 1887. Cases *supra*.

Again, the deed conveys the whole property, worth many thousands (nearly thirteen acres), without any offer to sell any less quantity, against the command of paragraph 2694, and against the command of the judgment. *French v. Edwards*, 13 Wall. 506, 20 L. Ed. 702; *Williams v. Peyton*, 4 Wheat. 77, 4 L. Ed. 518.

DAVIS, J.—On the fourth day of June, 1901, Martin Costello commenced an action in the court below against the

Arizona Eastern and Montana Smelting, Ore Purchasing and Development Company, the Turquoise Mining Company, and George W. Seaverns, to quiet his title to the Mona, a patented mining claim, situate in the Tombstone Mining District. The defendant companies made no defense to the suit. The defendant George W. Seaverns filed an answer and cross-complaint. The answer generally and specifically denies each and every allegation of the complaint. In his cross-complaint the defendant "alleges that he is the owner, possessed, and entitled to the possession of the mining claim described in the plaintiff's complaint; that the plaintiff is setting up and asserting title to said mining claim which is adverse to that of this defendant, and is a cloud upon the defendant's title to said premises. Defendant alleges that for 10 years continuously last past, and hitherto, he and his grantors and predecessors in interest have been in the quiet, peaceable, uninterrupted, exclusive, notorious, adverse, and undisputed possession of said mining claim, possessing, owning, and claiming to own the same against the plaintiff and the whole world, and during all of that time have paid the territorial, county, and other taxes lawfully levied thereon; and in bar of plaintiff's right, or pretended right, of action, this defendant now specially pleads the statutes of limitations of the territory of Arizona, as contained in the Civil Code thereof, title 44, c. 1, par. 2299, sec. 3, and the other laws of the said territory with reference thereto. Rev. Stats. 1887." The defendant prayed that the plaintiff take nothing by his action, and that defendant have judgment for his costs and disbursements; that it be decreed that the plaintiff has no right, title, or interest in or to the said mining property, or any part thereof; that defendant's title thereto be forever quieted; and for such other general and equitable relief as to the court may seem meet. Upon the trial, the plaintiff introduced in evidence the patent issued by the United States to Charles McNamee for said Mona claim, dated December 28, 1883, together with regular and sufficient mesne conveyances from said patentee to himself, duly recorded, and thereupon rested his case. The defendant Seaverns then offered in evidence a deed from J. P. McAllister, tax-collector of Cochise County, dated November 25, 1891, purporting to convey to said defendant the mining premises in controversy, for the considera-

tion of six dollars, in virtue of a sale theretofore made under a tax-judgment rendered in the district court of said county. This deed recited various acts done, anterior to its execution, in compliance with the statute, which at the time required a court proceeding and judgment as a basis for the sale of property for delinquent taxes. The tax-deed did not, however, contain a recital of the name of the person, firm, company, or corporation assessed, and from whom the taxes on said premises were due, nor any statement that the same was unknown. Because of the omissions referred to, and also upon other grounds, the plaintiff objected to the introduction of the tax-deed in evidence, and the court reserved its ruling upon the objection. The defendant Seaverns testified as a witness in his own behalf. That portion of his testimony which is material was substantially as follows: "I am acquainted with the ground included within the confines of the Mona mine which is the subject of the litigation herein. I have been upon the premises, all over it. I supposed that I owned it, having the tax-title deed from Cochise County. I took title, as I claim, under this deed from the tax-collector. I have paid the taxes on the property for, I think, 10 years." To the question, on direct examination, "From the time that you bought this property from the tax-collector—from the time that the territory conveyed it to you, as described in this tax-deed—what have you done, with reference thereto, to the said mine, if anything?" the witness answered, "Nothing, but paid the taxes." There was no other evidence offered on the part of the defendant. As tending to prove the invalidity of the tax sale, the plaintiff, in rebuttal, sought to introduce certain documentary evidence, consisting of the assessment-roll of Cochise County for the year 1889, the order levying the taxes for that year, and the tax-judgment upon which the sale was predicated. The record shows that this evidence was received, subject to the objections thereto by the defendant, upon which the court reserved its ruling. The plaintiff tendered to the defendant on the trial the full amount which would be due to him, including penalties and costs, as the holder of a void tax-deed. A judgment and decree was rendered in the plaintiff's favor, quieting his title against the defendants, and each of them, and all persons claiming through or under said defendants, or any of them.

It was further decreed that the plaintiff should pay to the defendant Seaverns the sum of \$39.89, being the amount due to him under the statute as the holder of a void tax-deed. From this judgment the said defendant appeals.

The record shows that objections were interposed on the trial to the admissibility of certain documents offered in evidence, but it does not appear from the record what of said proffered evidence was considered by the court, or what excluded, in reaching its decision. Under these conditions, we must look into the case and determine whether the competent evidence sustains the judgment, for, if that be true, then we are justified in assuming that the lower court disregarded that which was incompetent. *United States v. Marks*, 5 Ariz. 404, 52 Pac. 773. The appellee, in proof of his title, showed a regular chain of transfer from the sovereignty of the soil to himself, by deeds duly registered. The appellant sought to prove title by his deed from the tax-collector. The statute in force at the time of the execution of this tax-deed, and applicable to instruments of this character, required that "the deed shall state the cause of the sale, the amount sold, the price for which the real estate was sold, the name of the person, firm, company or corporation assessed, and from whom the taxes were due, provided, the name is known, and if unknown, say 'unknown,' the same description of the land as is given in the order of sale and certificate of sale, and such other description as may be practicable for better identification." Rev. Stats. 1887, par. 2701. Where the statute prescribes the particular form of a tax-deed, the form becomes substance, and must be strictly pursued, or the deed will be void. *Blackwell on Tax Titles*, p. 366. A special power granted by statute, affecting the rights of individuals, and which divests the title to real estate, ought to be strictly pursued, and it should so appear on the face of the proceedings. *Atkins v. Kinnan*, 20 Wend. 240, 32 Am. Dec. 534. Where the statute requires particular matters to be recited in a tax-deed, the failure of the deed to contain such recitals renders the same void. *Grimm v. O'Connell*, 54 Cal. 522; *Hughes v. Cannedy*, 92 Cal. 382, 28 Pac. 573; *Simmons v. McCarthy*, 118 Cal. 622, 50 Pac. 761; *Wakeley v. Mohr*, 18 Wis. 321. The tax-collector's deed in the case before us contained no recital "of the name of the person, firm, company

or corporation assessed, and from whom the taxes were due," nor any statement that the same was "unknown." The deed was therefore void on its face because of want of compliance with the requirements of the statute. It was not even *prima facie* evidence that the title of the owner of the premises assessed was impaired, and could not form the basis for affirmative relief. *Simmons v. McCarthy, supra*. It cannot be contended that the tax-judgment, ordering the sale of the premises to satisfy the taxes, interest, penalties, and costs due thereon, would constitute any evidence of title in the appellant.

The court below held that the appellant had not pleaded facts sufficient to entitle him to have advantage of the statute of limitations which he invoked, because his pleading did not show that he was "claiming under a deed or deeds duly registered." The statute provides: "Every suit to be instituted to recover real property as against any person having peaceable and adverse possession thereof, cultivating, using, or enjoying the same, and paying taxes thereon, if any, and claiming under a deed or deeds duly registered, shall be instituted within five years next after the cause of action shall have accrued, and not afterwards." Rev. Stats. 1887, par. 2299. There is also a provision that "the laws of limitation of this territory shall not be made available to any person in any suit, in any of the courts of this territory, unless it be specially set forth as a defense in his answer." *Id.*, par. 2328. The pleading of the statute of limitations, however, does not dispense with the necessity of also pleading all facts essential to bring the party within the provisions of the statute, when the existence of those facts is not shown by the pleading of the opposite party. But this can have no important bearing upon the case at bar, since the evidence in regard to the appellant's occupancy of the disputed premises, which is wholly contained in the testimony of the appellant himself, is entirely too meager and indefinite to establish the "peaceable and adverse possession" without which the plea of limitations would be unavailing.

We think the judgment of the court below is sustained by the evidence, and it will therefore be affirmed.

Kent, C. J., and Sloan, J., concur.

[Civil No. 812. Filed Oct. 31, 1903.]

[74 Pac. 48.]

PHOENIX LIGHT AND FUEL COMPANY, Defendant and Appellant, v. THOMAS D. BENNETT, Plaintiff and Appellee.

1. **NEGLIGENCE—WHAT CONSTITUTES—ESSENTIAL INGREDIENT.**—An essential ingredient to any conception of negligence is that it involves the violation of some legal duty—a duty to take care of the person or property of another.
2. **SAME—REASONABLE CARE.**—Where a person, proceeding in a lawful business, exercises reasonable care, the law does not make him an insurer against the consequences of his actions which reasonable care and foresight could not have prevented.
3. **SAME—ELECTRICITY—WIRING—INSULATION—MUST BE SUFFICIENT TO PROTECT FROM CURRENT CARRIED FROM DEFENDANT'S PLANT—BUT NOT TO PROTECT FROM ELECTRICITY HAVING ITS ORIGIN IN THE CLOUDS OR ATMOSPHERE.**—Where plaintiff's house was destroyed by fire during a violent electrical storm, and plaintiff brought suit against defendant and electric light company, making the gravamen of his action the negligence of defendant in failing to properly insulate the wire which "it placed through the window casement of plaintiff's house" for the purpose of conveying to lights in said house, the current generated by said defendant, the court erred in submitting to the jury any question as to the defendant's liability for a failure to insulate these wires against electricity having its origin in the clouds or atmosphere.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Edward Kent, Judge. **Reversed.**

The facts are stated in the opinion.

Chalmers & Wilkinson, and Herndon & Norris, for Appellant.

Defendant's motions to instruct the jury to bring in a verdict for defendant under the evidence should have been granted by the court. When there is no evidence in the case to support the plaintiff's theory, the rule of law is that the jury should be so instructed, and judges are no longer required to submit a question to a jury merely because some

evidence has been introduced by the plaintiff, unless the evidence be of such a character that it would warrant the jury in finding a verdict for the plaintiff. *Schuylkill and D. Improvement etc. Co. v. Munson*, 14 Wall. 442, 20 L. Ed. 867; *Root v. Fay*, 5 Ariz. 19, 43 Pac. 527.

Where the verdict of a jury is palpably against the evidence, it is proper to invoke this rule. *Slate Creek Iron Co. v. Hall*, 11 Ky. Law Rep. 456, 12 S. W. 580.

There can be no doubt in regard to the rule that where damages are attempted to be recovered for an injury, the damages must result as the natural and proximate consequence of the wrongful act; and we admit the rule of law that one shall be held liable for those consequences which might have been expected as the natural result of his conduct, but not for those he could not have foreseen, and was therefore under no obligation to take into consideration.

The supreme court of the United States in *Insurance Co. v. Tweed*, 7 Wall. 44, 19 L. Ed. 65, said: "One of the most valuable *criteria* furnished us by the authorities is, to ascertain whether any new cause intervened between the effect accomplished and the alleged cause. If a new force or power has intervened by itself sufficient to stand as the cause of the mischief, the other must be considered as too remote."

The same doctrine is announced in *Fent v. Toledo etc. Ry. Co.*, 59 Ill. 349, 14 Am. Rep. 13; *Toledo etc. Ry. Co. v. Muthersbaugh*, 71 Ill. 572; *Schmidt v. Mitchell*, 84 Ill. 109, 25 Am. Rep. 446; *Scheffer v. Railroad Co.*, 105 U. S. 249, 26 L. Ed. 1070; *Haile's Curator v. Texas and Pacific Ry. Co.*, 60 Fed. 557, 9 C. C. A. 134, 23 L. R. A. 774; *Pullman Palace Car Co. v. Barker*, 4 Colo. 344, 34 Am. Rep. 89; *Bosch v. Burlington etc. R. R. Co.*, 44 Iowa, 402, 24 Am. Rep. 754.

"The law is not so absurd as to assume to hold any one responsible upon the ground of negligence for not doing that which he was practically under the circumstances unable to do." *Michigan Cent. R. R. Co. v. Burrows*, 33 Mich. 6.

In determining what is the proximate cause, the true rule is that the injury must be the natural and probable consequence of the negligence. There was no proof, nor any attempt to prove, that lightning was any more apt to enter the wires of the defendant without the clay bushing or rubber tubing than with it. See *Seale v. Gulf etc. Ry. Co.*, 65 Tex.

274, 57 Am. Rep. 602; *Brandon v. Gulf City etc. Co.*, 51 Tex. 121.

Defendant's contention was that it could only be held liable for damages resulting from an injury caused by its negligence, and if the injury was caused by a current of electricity coming in contact with the plaintiff's house through defendant's wires, that said electricity must have come from defendant's plant.

The plaintiff contended that defendant was liable regardless of where the current of electricity came from.

The court instructed the jury upon these two contentions.

In our view of this case these contentions were irreconcilable, and the instructions given by the court at the request of the respective parties and of his own motion were conflicting and erroneous, and calculated to and did mislead the jury. *Price v. Hannibal etc. Ry. Co.*, 77 Mo. 508; *McLean County Bank v. Mitchell*, 88 Ill. 52; *Hoben v. Burlington etc. R. R. Co.*, 20 Iowa, 566.

A. C. Baker, and Alfred Franklin, for Appellee.

The doctrine of "res ipsa loquitur" should be invoked in this case. On this proposition we cite the following cases as being strictly analogous to the one at bar in which this doctrine has been sustained. *Aycock v. Raleigh etc. Ry. Co.*, 89 N. C. 321; *Alton etc. Co. v. Foulds*, 81 Ill. App. 332; *Ray on Negligence of Imposed Duties*, 145; *Whittaker's Smith on Negligence*, 422, 423; *Haynes v. Raleigh Gas Co.*, 114 N. C. 203, 41 Am. St. Rep. 786, 19 S. E. 344, 26 L. R. A. 810.

A wire negligently allowed by an electric company to remain out of place, which, becoming electrified from the atmosphere, causes injury either to the person or property of another, imposes a liability upon the company for such damage. *Paine v. Electric etc. Co.*, 64 App. Div. 477, 72 N. Y. Supp. 279; *Southwestern Tel. etc. Co. v. Robinson*, 50 Fed. 810, 1 C. C. A. 684, 16 L. R. A. 545; *Jackson v. Wisconsin Tel. Co.*, 88 Wis. 243, 60 N. W. 430, 26 L. R. A. 101.

"It is clear that the business of maintaining and operating a telephone line is one that requires special knowledge and skill in the construction, inspection and repair of the line and instruments, and in the use of known and approved devices, if any there be, to guard against harmful effects to persons or

property from electricity which may be conducted over the line and into the instruments, and the defendant in engaging in the business and in contracting to place and maintain its instruments in connection with its wires for the use of its patrons in dwellings and other buildings, in the absence of stipulations to the contrary, is deemed to have undertaken to possess and exercise such knowledge and skill." *Griffith v. New England Tel. etc. Co.*, 72 Vt. 441, 48 Atl. 643, 52 L. R. A. 919, citing *Brown v. Edison etc. Illuminating Co.*, 90 Md. 400, 78 Am. St. Rep. 442, 45 Atl. 182, 46 L. R. A. 745; *McKay v. Southern Bell Tel. Co.*, 111 Ala. 337, 56 Am. St. Rep. 59, 19 South. 695, 31 L. R. A. 589; *Griffin v. United Electric Light Co.*, 164 Mass. 492, 49 Am. St. Rep. 477, 41 N. E. 675, 32 L. R. A. 400; *Perham v. Portland etc. Elec. Co.*, 33 Or. 451, 72 Am. St. Rep. 730, 53 Pac. 14, 40 L. R. A. 799.

In the consideration of the motion to make definite, as well as the principal contention,—to wit, as to whether the fire originated from electricity of appellant's power plant or from the atmosphere,—it is suggested by appellee that this pleading falls within the familiar rule that a plaintiff is not bound to plead facts which are peculiarly within the knowledge of the defendant. *Louisville etc. Ry. Co. v. Crunk*, 119 Ind. 542, 12 Am. St. Rep. 443, 21 N. E. 31; *Burnham v. Milwaukee*, 69 Wis. 379, 34 N. W. 389; *Louisville etc. Ry. Co. v. Jones*, 83 Ala. 376, 3 South. 902.

DAVIS, J.—This is an appeal by the defendant company from a judgment rendered against it in an action for damages for alleged negligence, which, it was claimed, resulted in the destruction of the plaintiff's property. The complaint upon which the action was founded, after stating the residence of the parties and the corporate character of the defendant, alleged, "that, at all the times hereinafter mentioned, defendant was engaged in the business of supplying electricity, by virtue of a public franchise, to its certain consumers and patrons in and near the city of Phoenix, and of wiring and equipping the houses and buildings of its said patrons and consumers for the purposes of lighting such houses with electricity; that on or about the first day of April, 1899, the defendant, in changing the wires in the house of plaintiff, on North Second Avenue, near the city of Phoenix, negligently,

wrongfully, and willfully caused the wire conducting electricity from its plant to plaintiff's house to be placed through the window casement of plaintiff's said house, without insulating the same in any manner whatsoever; that wholly by reason of said negligent placing of said wires as aforesaid, and without any knowledge, consent, or fault of plaintiff, said wire became charged with electricity on or about the eighteenth day of July, 1899, and set fire to and wholly destroyed plaintiff's said house, and furniture and effects of plaintiff therein, being of the value of five thousand dollars, to plaintiff's damage in the sum of five thousand dollars; that, at all the times herein mentioned, plaintiff was a purchaser and consumer, for hire, of the electricity furnished by defendant." A motion to require the plaintiff to make his complaint more definite and certain, by stating how and whence "said wire became charged with electricity," was denied, and a demurrer to the sufficiency of the complaint was overruled. The further answer of the defendant was a general denial of the allegations of the complaint, and upon the issues thus made the case was tried before the court and a jury, resulting in a verdict and judgment in favor of the plaintiff for the sum of \$3,404.50.

The evidence adduced on the trial showed the following facts: That the house of plaintiff at Phoenix, Arizona, was occupied by himself and family as a residence. It was an ordinary story-and-a-half brick house, which he had built during the latter part of the year 1896. At the time the house was built, it had been wired for the purpose of electric lighting by persons not connected with the defendant. That the first attachment with the defendant's plant was made at the front of the house, the wires entering through an upper window. The wiring remained in that condition for about two years. In the spring of 1899 the defendant changed its pole line to the alley back of the house, and then the wires connecting the defendant's plant with the plaintiff's house were changed to the back part of the house. The defendant placed its wires through the casement of a garret window at the rear end of the house in making the new connection. This change was without the knowledge of the plaintiff until some time after it had been made, but it appears never met with any protest from him. On the eighteenth day of July,

1899, at about nine o'clock in the evening, the house was burned, together with a large part of its contents. A thunder-storm had been prevailing on that evening. The plaintiff was just going to bed, when he noticed a glimmer on the stair-way. He ran upstairs, and saw that there was a fire in the window casement on the south side of the window, which he made ineffectual efforts to extinguish. About two hours before this the electric lights were on in the plaintiff's house, and he was reading by the same. Suddenly the lights went out—"just popped off." The plaintiff went upstairs, examined the wires in the part of the house where the connection had been made by the defendant, and examined the entrance of the wire into the house to see if it had come apart. He observed the condition of the wire at that point, and the insulation. He found the wires connected. The junction with the house wiring was on the inside of the upper story. This part of the house was not completely floored. The wires entered the house through auger-holes in the window casement. There were no crockery tubes or clay bushing where the wire penetrated the casement. In the unfloored space between the casement and the point at which it passed under the floor, there was two or three feet of slack in the wire. Plaintiff could not see that which passed through the casement, but such wire as was visible to him was in a damaged condition. It was frayed, and the insulation was loose upon it. It was not held tight at the point of entrance. It was an old wire, and had been in that condition from the time it was put there. Plaintiff had previously noticed this wire, and the loose way in which it was fixed up, but never so closely as on this occasion. There were porcelain spools on the eaves of the house, from which the wires ran into the window, and similar insulators along the garret joists, on the inside. There was no fuse-box at the window. The plaintiff used lamp-light after the electric lights went out, and resumed his reading downstairs. When he first saw the fire, it was in the window casement, immediately surrounding the wires. The blaze was two and one half feet in length, about four to six inches above the wires, and some distance below. The plaintiff was at the time hiring the use of electricity from the defendant for lighting purposes. On the morning after the fire the employees of the defendant took down the wires in the

vicinity of the plaintiff's house, and found them to be in fairly good condition, except that they were burned for a distance of twelve or fourteen feet from the building. The transformer, near by, which controlled the current to the plaintiff's house, was found to be uninjured. The usual and ordinary strength of this current was one hundred and four volts. Evidence was introduced as to the value of the property. A number of witnesses also testified as to the condition of the night; that a severe electrical storm was raging, during which there was a peculiarly bright flash of lightning, followed by a heavy clap of thunder, shortly after which they noticed fire coming from the roof of plaintiff's house. There was expert testimony to the effect that electric light companies make no attempt to insulate their wires against lightning, and that it is not practicable to do so.

Numerous errors are assigned by the appellant, but those which we consider to be fully determinative of this appeal are predicated upon the instructions which were given to the jury. The gravamen of the complaint in this case was the defendant's failure to properly insulate the wire which it "placed through the window casement of plaintiff's house." The peculiar facts of the case afforded an unusual opportunity for theorizing upon the cause of this fire. It was a theory of the plaintiff that the rain blown in at the auger-holes of the window casement had wetted the woodwork and wires, creating what is technically termed a "short circuit," and setting fire to the woodwork. The evidence cannot be said to sustain this theory, however, except upon the assumption that the voltage was greater than that of the ordinary current which passed over these wires from the defendant's plant for his lighting purposes. But the plaintiff contends that it was equally the duty of the defendant to so insulate these wires as to protect against an electrical current which might have been induced from the clouds or atmosphere. Upon this latter proposition, sharp issue was made at the trial; the position of the defendant being that it was only required to install and maintain its wires for safely carrying the current from its plant for the lighting of the plaintiff's house, and that the plaintiff must prove that his loss was occasioned by the electric current which passed from defendant's plant, through said wires, into his house. The instructions of the court upon

this point are complained of as being conflicting and erroneous. From the charge which was given, we quote the following: "The court instructs you that it does not make any difference where this electricity came from. If the electricity came in and caused the fire by reason of something about these wires, and you find that the defendant was negligent in putting in these wires and maintaining them, and that such negligence caused the fire, it does n't make any difference where the electricity comes from. But on the other hand, I also charge you that if the wires were sufficient to maintain the current of electricity from the plant of defendant, and such current as could be reasonably expected to come in through those wires to light the house, then the defendant is not responsible by reason of any increased voltage on those wires that might come from a stroke of lightning, provided the wires were reasonably placed so as to carry the current that was used in lighting the house. The jury are instructed that defendant is required to insulate its wires so as to protect property through which said wires pass, against danger which may arise from a current of electricity generated by defendant's plant, and passing through said wires, and not from a current generated elsewhere and from other agencies, unless such other agencies were with the consent of defendant." It appears from the record that at the conclusion of the evidence the parties consented that the court should deliver its charge to the jury after the argument, but that the instructions requested by the respective parties were settled by the court in advance, so that they could be used in the argument. That the trial judge marked as "Given," and appended his name in the manner required by statute to, the following instruction, which had been requested by the defendant: "You are further instructed that if, in weighing the testimony in this case, you are unable to decide therefrom whether the fire was caused from the electric current generated by defendant's plant through said wires, or from lightning either passing through said wires, or striking the house directly, and in another part of the house than through the wires, that you should find your verdict for the defendant. It is the duty of the plaintiff, by a preponderance, to prove that the loss was occasioned by the electric current passing from defendant's plant through said wires into the house, and this proof must be made by a

preponderance of the evidence; and, if plaintiff fails to make this proof, your verdict should be for the defendant." Counsel for the defendant made use of this instruction in their argument of the case, and discussed the same before the jury. On the completion of the argument, the court delivered its charge to the jury, and, in so doing, modified this particular instruction by adding thereto and giving in connection therewith the words, "except as I have said before, it does not make any difference where the power came from—whether of clouds and electricity, or from the plant." Considering the very slight foundation in the evidence for the claim that any current was on these wires from the defendant's plant at the time of the fire, it is readily apparent how prejudicial might have been this modification after the argument was closed. But we think that the chief vice of the court's charge was in the submission to the jury, in this case, of any question as to the defendant's liability for a failure to insulate these wires against electricity having its origin in the clouds or atmosphere. An essential ingredient to any conception of negligence is that it involves the violation of some legal duty which one person owes another—a duty to take care for the safety of the person or property of the other. This duty may be assumed by contract, or it may be imposed by implication of law. Where a person, proceeding in a lawful business, exercises reasonable care, the law does not make him an insurer against those consequences of his actions, which reasonable care and foresight could not have prevented. The law justly ascribes such consequences to inevitable misfortune or to "the act of God," and leaves the harm resulting from them to be borne by him upon whom it falls. 1 Thompson on Negligence, 2d ed., sec. 14. In the conduct of an electric lighting business, the defendant was engaged in handling a most dangerous agency, and, in the generation and distribution of electricity from its plant to its patrons, was unquestionably bound to exercise the highest degree of skill and care for the protection of life and property. The duty thus imposed clearly required that the wires which the defendant "placed through the window casement of plaintiff's house" would be sufficiently insulated to protect said house against injury from any current carried on them from the defendant's plant. This duty did not, however, extend so far as to require

the insulation of these wires in a manner to protect against injurious consequences of a lightning stroke, for the evidence shows that it was not practicable to insulate them against lightning, and there is nothing in the record which indicates any assumed or implied obligation of this character. And what we have here said as to lightning must, it seems to us, under the facts of this case, be equally applicable to any induced current of electricity having its origin in the clouds or atmosphere, because there is absolutely nothing in the evidence from which the strength of such a current could be estimated. While the learned trial judge, in other portions of his charge, apparently intended to so declare the law as to relieve the defendant from liability for the consequences of a current of greater voltage than that which would be carried on these wires for the lighting of the plaintiff's house, if the wires were sufficiently installed and insulated for the latter purpose, we feel that, in submitting to the consideration of the jury in this case any question of negligence based upon the defendant's failure to insulate against a foreign current of electricity, he was inviting them into the realm of speculation, in which conjecture, and not evidence, must guide them, and that the jury may readily have been misled thereby, to the prejudice of the defendant.

For the errors pointed out, the judgment will be reversed, and the case remanded to the district court for a new trial.

Sloan, J., and Dean, J., concur.

MEMORANDUM CASES.

[Criminal No. 163.]

GUILLERMO ROMERO, Appellant, v. TERRITORY OF ARIZONA, Respondent.

APPEAL from the District Court of the First Judicial District in and for the County of Cochise. **F. M. Doan, Judge.**
Ben Morgan, for Appellant.
E. W. Wells, Attorney-General, for Respondent.
January 12, 1903. Dismissed.

[Civil No. 821.]

THE CITY OF PRESCOTT, Appellant, v. T. C. HILL, Appellee.

APPEAL from the District Court of the Fourth Judicial District in and for the County of Yavapai. **R. E. Sloan, Judge.**

J. H. Collins, for Appellant.

Ross & O'Sullivan, for Appellee.

January 15, 1903. Dismissed on short transcript under paragraph 1583 of the Revised Statutes of Arizona, 1901.

[Civil No. 823.]

COUNTY OF PIMA, Appellant, v. CITY OF TUCSON, a Municipal Corporation, Appellee.

APPEAL from the District Court of the First Judicial District in and for the County of Pima. **George R. Davis, Judge.**

No appearance for Appellant.

Roscoe Dale, and Wright & Fleming, for Appellee.

January 15, 1903. Affirmed on short transcript under paragraph 1583 of the Revised Statutes of Arizona, 1901.

[Civil No. 732.]

LEWIS WOLFLEY, Petitioner, v. **NATHAN O. MURPHY**
et al., Defendants.

ORIGINAL APPLICATION for Writ of *Mandamus*.

J. H. Kibbey, and **J. B. Woodward**, for Petitioner.

C. F. Ainsworth, for Defendants.

January 15, 1903. Petition for writ denied.

[Civil No. 818.]

THE TURQUOISE COPPER MINING AND SMELTING
COMPANY, a Corporation, Appellant, v. **THE COPPER**
BELLE MINING COMPANY, a Corporation, Appellee.

APPEAL from the District Court of the First Judicial
District in and for the County of Cochise. **George R. Davis**,
Judge.

English & Bowman, for Appellant.

James Reilly, for Appellee.

January 16, 1903. Affirmed on short transcript under para-
graph 1583 of the Revised Statutes of Arizona, 1901.

[Civil No. 820.]

THE NATIONAL BANK OF ARIZONA, a Corporation,
Appellant, v. **M. W. KALES**, Appellee.

APPEAL from the District Court of the Third Judicial
District in and for the County of Maricopa. **Edward Kent**,
Judge.

Thomas Armstrong, Jr., for Appellant.

Baker & Bennett, for Appellee.

January 20, 1903. Affirmed on short transcript under para-
graph 1583 of the Revised Statutes of Arizona, 1901.

[Civil No. 801.]

S. H. VAN SLYCK et al., Appellants, v. JOHN L. ALEXANDER, Appellee.

APPEAL from the District Court of the Second Judicial District in and for the County of Graham. F. M. Doan, Judge.

J. S. Sniffen, and William Lovell, for Appellants.

Edwards & McFarland, for Appellee.

January 20, 1903. Dismissed.

[Criminal No. 164.]

SIMON ALDERETE, Appellant, v. TERRITORY OF ARIZONA, Respondent.

APPEAL from the District Court of the Fourth Judicial District in and for the County of Yavapai. R. E. Sloan, Judge.

No appearance for Appellant.

E. W. Wells, Attorney-General, for Respondent.

March 20, 1903. Affirmed.

THE COURT.—The defendant, Simon Alderete, was tried and convicted at the June term, 1902, of the district court of Yavapai County of the crime of murder in the first degree, and is under sentence of death. We have before us only a transcript of the record in this case. There is no bill of exceptions or statement of facts. No brief has been filed, or assignment of errors, and we are not advised of what the appellant complains of or relies upon for a reversal. We have made a careful examination of the record, but can discover no error which would warrant a reversal of the judgment of the court below. The judgment will therefore be affirmed.

[Civil No. 794.]

MARTIN GOULD et al., Appellants, v. THE MARICOPA CANAL COMPANY, a Corporation, Appellee.

APPEAL from the District Court of the Third Judicial District in and for the County of Maricopa. Edward Kent, Judge.

E. W. Lewis, for Appellants.

C. F. Ainsworth, for Appellee.

March 20, 1903. Affirmed.

THE COURT.—This was an action brought by the appellee corporation against Martin Gould and three other defendants owning lands lying under the Maricopa Canal in Maricopa County to enjoin and restrain said defendants from entering upon said canal, interfering with the headgates therein, or in any manner obstructing the appellee in the operation and management of its said canal and headgates. The case involves the same questions as that of *Hayois v. Salt River Canal Co.*, (decided at the present term), *ante*, p. 285, 71 Pac. 944. For the reasons given in the opinion in that case the judgment here appealed from is also affirmed.

[Civil No. 790.]

HENRY HARMON, Administrator of the Estate of Jerry Neville, Deceased, Appellant, v. GEORGE W. CROWE, Appellee.

APPEAL from the District Court of the First Judicial District in and for the County of Santa Cruz. George R. Davis, Judge.

Affirmed (Memorandum), 204 U. S. 241.

Smith & Ives, and Frank J. Duffy, for Appellant.

Hereford & Hazzard, for Appellee.

March 20, 1903. Reversed.

DOAN, J.—Upon the authority of the case of *Trickey v. Crowe* (decided by this court), *ante*, p. 176, 71 Pac. 965, the judgment of the trial court in this case is reversed, the case is remanded, and judgment is directed to be entered in the lower court for the defendant.

Kent, C. J., and Sloan, J., concur.

[Civil No. 810.]

THOMAS F. WILSON, on behalf of the Territory of Arizona, Appellant, v. N. O. MURPHY et al., Appellees.

APPEAL from the District Court of the Third Judicial District in and for the County of Maricopa. Edward Kent, Judge.

Affirmed (Memorandum), 203 U. S. 580.

E. S. Ives, for Appellant.

C. F. Ainsworth, and Robert E. Morrison, for Appellees.

March 20, 1903. Dismissed.

[Civil No. 811.]

THOMAS F. WILSON, on behalf of the Territory of Arizona, Appellant, v. GEORGE W. VICKERS et al., Appellees.

APPEAL from the District Court of the Third Judicial District in and for the County of Maricopa. Edward Kent, Judge.

Affirmed (Memorandum), 203 U. S. 581.

E. S. Ives, for Appellant.

Robert E. Morrison, for Appellees.

March 20, 1903. Dismissed.

[Civil No. 825.]

In the Matter of the Application of W. H. CHAPMAN for a Writ of Certiorari to the Board of Supervisors of the County of Graham, Territory of Arizona.

ORIGINAL PROCEEDING.

Herring & Mitchell, for Petitioner.

Hereford & Hazzard, for W. H. Settle.

March 20, 1903. Judgment entered annulling proceedings of the board.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
TERRITORY OF ARIZONA
DURING THE YEAR 1904

[Civil No. 822. Filed January 12, 1904.]

[74 Pac. 1052.]

AXEL W. HALLENBORG et al., Plaintiffs and Appellants,
v. COBRE GRANDE COPPER COMPANY et al., De-
fendants and Appellees.

1. **INJUNCTION—CORPORATIONS—STOCKHOLDERS.**—An injunction is properly refused where the suits which minority stockholders of a corporation, seek to enjoin the corporation from dismissing are at the time dismissed or are enjoined from being dismissed by the court in which they are pending, or have been decided favorably to plaintiffs' prayer for relief, and officers of such corporation sought in the action to be removed have already resigned, since no case is presented where an injunction could afford plaintiffs any relief.
2. **CORPORATIONS—RECEIVER—DENIED.**—No ground for the appointment of a receiver is shown where the only property of the corporation within the jurisdiction of the court is funds in the treasurer's hands acquired by the company by virtue of an agreement the invalidity of which constitutes the ground of plaintiffs' cause of action.
3. **SAME—SAME—SAME.**—Where it appears that the only purpose which would be subverted by the appointment of a receiver, in an action brought by minority stockholders of a corporation, would be the bringing of suits on behalf of the corporation, the appointment of a receiver is properly denied, since the minority stockholders have authority to institute the actions without the interposition of a receiver.
4. **SAME—SAME—SAME.**—That a receiver being in possession of the books and records of a corporation would be in a better position to prosecute actions on its behalf than a stockholder who might be denied an inspection thereof affords no sufficient ground for the appointment, since the courts are not loath to permit inspection of records to stockholders in suits properly instituted by them.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. R. E. Sloan, Judge. Affirmed.

Affirmed. 200 U. S. 239, 50 L. Ed. 458.

The facts are stated in the opinion.

John J. Hawkins, J. F. Wilson, A. B. Cruikshank, and Henry G. Atwater, for Appellants.

Barnes & Martin, L. H. Chalmers, Herndon & Norris, Ben Goodrich, and Eugene S. Ives, for Appellees.

KENT, C. J.—The amended complaint in this action contains in substance the following allegations: That the plaintiffs are stockholders in the Cobre Grande Copper Company, an Arizona corporation, one of the defendants herein, and that the plaintiff Hallenborg is a creditor of said company. That since January 1, 1900, the said Cobre Grande Copper Company has been engaged in a series of litigation with the defendants William C. Greene, George Mitchell, and their associates, confederates, and agents; that said litigation, among other things, involved the title and right of possession to certain mining property situate in the state of Sonora, republic of Mexico. That the Cobre Grande Copper Company claims to be the rightful owner and entitled to the possession of said property, and that the defendant Greene wrongfully and fraudulently had dispossessed said company, and is now in the wrongful and fraudulent control of the same. That suits are pending in the courts of Mexico, brought by the Cobre Grande Copper Company, to recover possession of said property. That actions in replevin, instituted by the company, are pending in New York and in Texas. That there was pending, at the time of the commencement of this suit, an action in the district court of the third judicial district of the territory of Arizona, in and for the county of Maricopa, against the defendant Greene, the defendant Mitchell, and the defendant Phoenix National Bank to prevent the delivery by said bank to said Greene of certain deeds to said mining

property held by said bank in escrow, and to have the right of the Cobre Grande Copper Company in and to a certain contract of sale and purchase of said property determined and adjudged; and that said action was brought in aid of the efforts of the said Cobre Grande Copper Company to recover said property, and to have the right of the Cobre Grande Copper Company, after the restoration of the possession of said mines, to make a payment of thirty-seven thousand five hundred dollars due under said agreement for the purchase declared to be an existing right, and that said contract of purchase be declared to be in full force and effect, and for an accounting by Greene. That on December 12, 1900, for the purpose of controlling the suits brought by the Cobre Grande Copper Company as aforesaid, said Greene and the Greene Consolidated Copper Company entered into fraudulent and corrupt contract and conspiracy with the defendant E. B. Gage and other directors of the Cobre Grande Copper Company, wherein it was agreed between the said Greene and the said Greene Consolidated Copper Company on the one side and the defendant E. B. Gage and the Cobre Grande Copper Company, by said E. B. Gage, president, on the other side, substantially as follows: That the said Greene and the Greene Consolidated Copper Company agreed to buy from the defendant Gage 115,049 shares of stock of the Cobre Grande Copper Company, held by him as trustee for certain stockholders of said company, at the price of \$2.50 per share; and that upon the purchase of said stock being made the defendants Adamson, Costello, Wood, and O'Keefe, as a part of said transaction, would resign as directors of said Cobre Grande Copper Company; and that said Greene and the Greene Consolidated Copper Company should thereupon be allowed to elect and appoint the officers and directors of the Cobre Grande Copper Company in their own interests; and that, further, the suits, actions, and proceedings brought by the Cobre Grande Copper Company for the protection of its rights against the said Greene, Mitchell, and the Greene Consolidated Copper Company should be dismissed. That as a further consideration of said agreement it was agreed that said Gage should receive for himself five thousand shares of the stock of the Greene Consolidated Copper Company, alleged to be at the time of the market value of ten dollars per share; and, further, that

the defendant Costello, a director of said Cobre Grande Copper Company, should have large personal benefits to himself,—to wit, that his note for twenty-three thousand dollars to the Cobre Grande Copper Company should be surrendered to him. That the other directors, Adamson, Wood, and O'Keefe, by a secret compact and arrangement between them and the said Greene and the said Greene Consolidated Copper Company, were to receive additional gains and advantages, either by way of stock in the Greene Consolidated Copper Company, or in some other way. That said agreement, and the whole thereof, was and is illegal and fraudulent as to the plaintiffs, and as to all other persons, creditors, and stockholders similarly situated; and that the object and effect thereof is to transfer to the enemies of the Cobre Grande Copper Company the management and control of the corporation with the intent and design that such management and control should be used to prevent the said Cobre Grande Copper Company from enforcing its rights as against said Greene and said Greene Consolidated Copper Company to obtain possession of said property and to complete its contract for the purchase thereof. That the Cobre Grande Copper Company is possessed of no property or assets other than the choses in action represented by said suits; and that, if the latter be discontinued or dismissed, said company will be without property or funds with which to pay its debts or to distribute in the way of profits or dividends among its stockholders. That the said mining property is of great present and prospective value,—namely, of the value of five million dollars or thereabouts. That the defendants Greene, Mitchell, the Cobre Grande Copper Company, and the Greene Consolidated Copper Company threaten and intend, for the purpose of destroying and wrecking the Cobre Grande Copper Company, to dismiss or cause to be dismissed and discontinued the said suits, and to turn over all the assets of the property of said Cobre Grande Copper Company to said Greene, Mitchell, or the Greene Consolidated Copper Company, or some other controlled by them.

On these facts as alleged the plaintiffs prayed for the following relief, to wit: For an injunction restraining the defendants from discontinuing or causing to be discontinued or dismissed each and all of said pending suits; that a mandatory injunction issue directing said defendants to faithfully

prosecute and pursue in behalf of the Cobre Grande Copper Company all said actions and proceedings; that the plaintiffs be made parties in such suits; that a receiver be appointed to take possession of the assets and property of the Cobre Grande Copper Company, with power to prosecute and maintain said actions, and to bring such other and further suits as may be necessary to protect the rights of said company; that the defendants Gage, Adamson, Costello, Wood, and O'Keefe be removed from their offices and as directors of the company; and that the Phoenix National Bank be restrained from delivering the title deeds to the property to Greene and Mitchell.

On the trial of the cause the following uncontroverted facts were established, to wit: That the action brought by the Cobre Grande Copper Company in the state of Texas had been dismissed prior to the issue of the temporary injunction. That the action which was pending in the state of New York is still pending and undetermined, and that the defendants have been enjoined by an order of one of the courts of that state from dismissing said action, or causing it to be dismissed. That the action pending in the district court of Maricopa County was decided and had gone to judgment, and that as a part of said judgment the Phoenix National Bank was commanded to and had delivered up the papers and documents to Greene, and that the directors whose removal was desired had resigned, and had ceased to be officers or directors of the company. The trial court rightly held that, in view of these facts, an injunction could afford the plaintiffs no relief, and, as the case stood, the only question left was whether a receiver should be appointed.

The question presented on this appeal for our determination is whether, in view of the pleadings and the admitted situation of the parties at the time of the trial of the action, the district court was within a proper exercise of its discretion in refusing to appoint a receiver. If so, judgment was properly entered for the defendants. The grounds on which the receivership is asked are, substantially: That the suit in the district court of Maricopa County was brought in good faith by the Cobre Grande Copper Company to recover from Greene the possession of the Mexican property; that the agreement of December 12, 1900, whereby that suit and the various other suits were to be dismissed was and is fraudulent, because it

provided no adequate consideration to be paid the Cobre Grande Company, and because the directors of the company themselves received money as a consideration for its execution; that the judgment rendered in the district court of Maricopa County was not an estoppel of record, as it was collusively obtained, Greene having obtained control of both sides of the litigation, after the trial, but prior to the entry of the judgment; and that by this agreement and by the entry of this collusive judgment Greene and his associates have deprived these appellants, as minority stockholders, of valid rights and interests, and have prevented a recovery of the Mexican property. The purposes for which a receiver is asked are twofold, so far as the record is concerned: First, that he may take charge of the property of the company; second, that he may prosecute its litigation. As was pointed out by the district court, the only property of the company within the jurisdiction of the court is the funds in the treasurer's hands, acquired by the company by virtue of the agreement of December 12th, the validity of which is disputed by the plaintiffs. If the agreement was invalid, as claimed by the plaintiffs, the court could not consistently have appointed a receiver of property acquired solely by means of the agreement. On the other hand, if the agreement was valid, the plaintiffs admittedly had no sufficient cause of action for the appointment of a receiver or otherwise. The sole remaining purpose for which the receiver was to be appointed was to prosecute such litigation as should reinstate the company as a litigant in the position it was at the time of the execution of the agreement, with the ultimate object and purpose of regaining the Mexican property; and the complaint and the record in the case clearly show that this, and not the administration of the fund, is in reality the purpose for which the receiver is desired.

In the view we take, it is not incumbent on us nor proper for us to determine in the case before us whether the judgment in the action in the district court of Maricopa County was a proper and valid judgment, or whether the agreement of December 12th was illegal and without consideration, nor is relief in this respect prayed for in the complaint. The question for us to determine is whether the district court, in refusing to appoint a receiver in this action, exercised a sound judicial discretion, based upon a due consideration of the facts

and the rights and interests of the respective parties. Apart from the question whether the court has the power to appoint a receiver where no relief other than the appointment of a receiver is asked for or can be granted under the pleadings or the facts—which we do not deem it necessary to determine—we are of the opinion that under the facts in this case the district court was within a proper exercise of its discretion in its refusal to appoint a receiver. As the matter then stood, the district court of Maricopa County had, by its judgment, valid upon its face, determined adversely to the company its claims to the Mexican properties. While this judgment stands, the appointment of a receiver will not aid the company or the plaintiffs in the recovery of the Mexican properties, for the judgment stands in the way of any assertion of rights to the property. The validity of this judgment is strenuously denied by the plaintiffs, but its invalidity must be determined in an action brought directly for that purpose, and until so determined it is a bar to the recovery of the property by any one on behalf of the corporation. Such an action can be instituted and prosecuted by the plaintiffs as minority stockholders, and a receivership is not necessary for such purpose. If such action should result in the vacating and setting aside of the judgment, the same minority stockholders, if the corporation or its officers refuse so to do, can maintain as fully as such corporation such actions looking to the enforcement or determination of its property rights as may be necessary or proper. Such proceedings for the determination and adjudication of the rights of the plaintiffs and of the company can be instituted and prosecuted with practically the same force and effect by these stockholders as if instituted and prosecuted by a receiver appointed for that purpose. The institution of such action being the sole purpose of the appointment of a receiver, we cannot say that the court was not exercising a sound discretion in refusing to make such appointment, and through its receiver embark in such litigation, in view of the possible harm to the company that might result from a receivership, where the plaintiffs themselves had a complete and adequate remedy of which they might avail themselves without the interposition of a receiver.

It is urged that a receiver, being in possession of the books and records of the company, would be in a better position

to prosecute such actions than a stockholder, who might be denied an inspection thereof. In any event, such reason affords no sufficient ground in itself for the appointment; but the courts of this territory are not loath to lend their aid, when necessary, by effectual process to enable a stockholder to obtain access to the records of his corporation in a proper case, and for a proper purpose.

Upon a full review of the pleadings and the admitted facts in this case, we are of the opinion that the district court was well within the exercise of sound discretion in refusing to appoint a receiver herein, and that there was not any other relief which the court could properly grant the plaintiffs in this action. The judgment will therefore be affirmed.

Doan, J., and Davis, J., concur.

[Criminal No. 179. Filed March 26, 1904.]

[76 Pac. 456.]

**TERRITORY OF ARIZONA, Plaintiff and Appellant, v.
R. R. RICHARDSON, and JAMES JOHNSON, Defendants and Respondents.**

1. **PUBLIC HIGHWAYS—PRIVATE ROADS—WHAT CONSTITUTES—REV. STATS. 1901, PARS. 614, 3956, 3972, 3990, 3998, CITED.**—Paragraph 3956, *supra*, provides that all roads and highways located as public highways by order of the board of supervisors, and all roads in public use which have been recorded as public highways, shall be public highways, and all roads in public use not coming within the foregoing provisions are declared vacated. Paragraph 3972, *supra*, confers authority upon the board of supervisors to lay out public and private roads in the manner therein prescribed. *Held*, that public highways are such only as come within the express provisions of the statute declaring them to be such, while private ways are such as are laid out by authority of law, and roads established without authority for the convenience of individuals are without a legal status either as public highways or private ways.
2. **CRIMINAL LAW—MALICIOUS INJURY TO PRIVATE ROAD—REV. STATS. ARIZ., PEN. CODE, SEC. 524, CONSTRUED.**—Section 524, *supra*, makes it punishable to maliciously injure any public highway, or "private

way laid out by authority of law," but does not make it a criminal offense to commit an injury to a private way not laid out by authority of law.

3. ~~SAME—SAME—INDICTMENT—SUFFICIENCY—REV. STATS. ARIZ., PEN. CODE, SEC. 544, CITED—GIST OF OFFENSE.~~—An indictment under section 524, *supra*, for maliciously injuring a private way laid out by authority of law, is fatally defective, the allegation that defendant did maliciously "dig up a private way laid out by authority of law" being merely descriptive, and failing to aver facts showing that the way was laid out by authority of law or directly to aver that the way was so laid out by authority of law; the malicious digging up of a private way becoming a criminal offense only when such way is laid out by authority of law.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Santa Cruz. George R. Davis, Judge. Affirmed.

The facts are stated in the opinion.

E. W. Wells, Attorney-General, and Smith & Ives, for Appellant.

Hereford & Hazzard, for Respondents.

KENT, C. J.—Section 524 of the Penal Code of Arizona reads as follows: "Every person who maliciously digs up, removes, displaces, breaks or otherwise injures or destroys any public highway or bridge, or any private way laid out by authority of law, or bridge upon such highway or private way, is punishable by imprisonment in the territorial prison not exceeding five years, or in the county jail not exceeding six months." Under this section an indictment was found against the defendants in the following terms: "R. R. Richardson and James Johnson are accused by the grand jury of the county of Santa Cruz, territory of Arizona, by this indictment, found on the 22d day of December, A. D. 1903, of the crime of digging up a private way laid out by authority of law, committed as follows, to wit: The said R. R. Richardson and James Johnson on or about the 17th day of September, A. D. 1903, and before the finding of this indictment, at the county of Santa Cruz, territory of Arizona, did unlawfully, willfully, feloniously, and maliciously dig up a private way laid out by authority of law, to wit, the private way in said

Santa Cruz County, territory of Arizona, leading from the county road between Harshaw and Washington Camp to the Trench Mine, by digging a shaft across the center of said private way, said shaft being about six feet long, four feet wide, and five feet deep, at a point about one hundred and fifty feet from the said county road leading from Harshaw to Washington Camp, contrary," etc. A demurrer was interposed to this indictment on the ground that the indictment did not charge a public offense or any offense against the defendants; that the indictment failed to charge that the way was a private way, or what private way was intended, or to whom the same belonged, or whether the digging was without the consent of the owner of the way, or whether the way was laid out by authority of the law of Arizona or elsewhere; and that the indictment was not direct and certain as to the offense, or as to the circumstances of the offense. The demurrer was sustained by the court, and the territory has brought this appeal.

We find in the Revised Statutes the following provisions pertinent to the question raised on this appeal:—

"Par. 3956. All roads and highways in the territory of Arizona which have been located as public highways by order of the board of supervisors, and all roads in public use which have been recorded as public highways, or which may be recorded by authority of the board of supervisors, from and after the passage of this title, are hereby declared public highways; and all roads in the territory of Arizona now in public use, which do not come within the foregoing provisions of this section, are hereby declared vacated. . . .

"Par. 3972. The board of supervisors, on presentation of a petition, signed by ten or more persons, residents of the county, and paying road taxes therein, praying for a public road to be laid out or changed within the county, or a petition signed by one or more persons, praying for a private road or lane to be laid out from the ranch or dwelling of any person to the public road, and designating the location of the road to be established as prayed for, shall cause notice . . . ; provided, that all damages and expenses accruing from the location of any private road or lane shall be paid by the party or parties petitioning for said road; and the board of supervisors may, before acting upon any petition for such private road or lane, require such a bond from the party or parties

so petitioning, as shall in their judgment seem proper, to be held as security for all damages or expense accruing from the location of said road, liabilities upon said bonds to be collected as is provided by law in similar cases. . . .

"Par. 614. Every city . . . shall have the power to lay out . . . maintain and improve streets," etc.

"Par. 3990. In all of the towns in the territory not incorporated, and containing a population of more than five hundred souls, the streets shall be considered as public highways, and under the control of the board of supervisors of the county in which such towns may be situated.

"Par. 3998. Any person or persons desiring to construct and maintain a toll road within one or more counties of this territory, shall make, sign and acknowledge, before some officer entitled to take acknowledgment of deeds, a certificate specifying, first, the name by which the road shall be known, and, second, the names of the places which shall constitute the termini of said road. Such certificate shall be accompanied," etc.

We find no reference to private ways or private roads in the statute, other than as contained in the sections hereinbefore referred to. In the common acceptation of the term, roads or ways are considered to be either public or private; but in the legal acceptation a way may be a road that is neither a public highway nor a private road or way, under our statutes. Public highways are such only as come within the express provisions of the statutes declaring them to be such. The statutes do not define a private road or way. At common law a private way is the right of passage over or under another person's ground, which belongs to and is for the use of individuals—one or more—as distinct from a way that is used by the public in general, and such a way is an easement. 1 Am. & Eng. Ency. of Law, 2d ed., p. 3. Such a private way may be acquired by grant, reservation, prescription, or under a statute authorizing its establishment. In contemplation of law, therefore, though perhaps commonly known and spoken of indiscriminately as public and as private roads, many, if not a majority, of the roads and ways running throughout all parts of the territory, and frequently in general public use, are neither public highways nor private ways, but are simply roads established without authority for the convenience of individu-

als, and without a legal *status* either as public highways or private ways. Such roads, where they may have heretofore existed as public highways, and where no right has vested, have by the legislature been declared vacated. This action of the legislature, however, does not create them private ways. The legislature has made it clear that it was not its intention to make it a criminal offense to commit an injury to any such class of roads, even if they might be considered as private ways. Our Penal Code in the section under discussion has expressly limited such injury to injury to public highways, and to private ways laid out by authority of law. Even if such roads might be considered therefore to be private ways, nevertheless they are not included in this statute, for they are not ways laid out by authority of law, such as would be, for example, ways laid out as provided in paragraph 3972 of the statutes. They are, on the contrary, in most instances, ways laid out and maintained without authority of law.

The indictment in the case before us is defective, in that it not only fails to contain any allegations respecting the facts surrounding the establishment and existence of the private way upon which the injury is alleged to have been committed, from which it can be inferred even that such way was laid out by authority of law; but the indictment fails to allege in direct terms that such way was a way laid out by authority of law. While the indictment does contain the allegation that the defendants did maliciously "dig up a private way laid out by authority of law, to wit," etc., such an allegation is descriptive, merely, and, as set forth, it is not a direct allegation that such way was a way laid out by authority of law. The act of maliciously digging up a private way is not necessarily a criminal offense under our statutes. It becomes one only when such way is a way laid out by authority of law. Therefore an indictment which fails to allege facts showing that such way was so laid out, and which does not even contain the direct allegation that such way was a way so laid out, is defective and cannot be sustained.

Our conclusion in this respect makes it unnecessary to consider the other objections urged.

The judgment of the court below is affirmed.

Sloan, J., and Doan, J., concur.

[Civil No. 855. Filed March 26, 1904.]

[76 Pac. 458.]

MARTIN BUGGELN, Petitioner, v. **E. M. DOE**, as District Attorney of the County of Coconino, Territory of Arizona, Respondent.

1. **MANDAMUS TO DISTRICT ATTORNEY—QUO WARRANTO—REV. STATS. 1901, PAR. 3794, CONSTRUED.**—While the statute, *supra*, authorizing *quo warranto* does not make it mandatory upon a district attorney to institute such action unless he has reason to believe a franchise is being usurped, nevertheless it is his duty, whenever facts are laid before him from which he can reasonably conclude that a franchise is being usurped, to institute such proceedings, and if he fails his action can be reviewed upon an application for *mandamus*.
2. **SAME—SAME—SAME—PLEADING—SUFFICIENCY OF PETITION.**—A petition for writ of *mandamus* to compel a district attorney to institute *quo warranto* proceedings is insufficient where it appears that all that was presented to him was a verified complaint, possibly sufficient as a pleading in *quo warranto*, which did not contain allegations sufficient to show that the franchise was being usurped. The application for writ of *mandamus* must show that facts were laid before him from which he could have had reason to believe that such franchise was being usurped.

PETITION for Writ of Mandamus.

T. J. Norton, for Petitioner.

E. M. Doe, for Respondent.

THE COURT.—We think the statute authorizing an action in the nature of *quo warranto* does not make it mandatory upon the district attorney to institute such action, unless he has reason to believe that an office or franchise is being usurped, intruded into, or unlawfully held or exercised. It is, however, his duty to bring such proceedings when facts are laid before him from which he can reasonably conclude that such franchise is being usurped. If, on such showing, he fails to institute such proceedings, his action can be reviewed upon an application for *mandamus*; and where, upon such application, it appears to the court that such a showing has been made to the district attorney, from which he could reason-

ably conclude that such franchise had been usurped, a writ of *mandamus* will issue to compel the institution by such district attorney of a proper proceeding in the nature of *quo warranto*.

The demurrer to the petition for the writ of *mandamus* raises the question whether such petition shows that facts were laid before the district attorney from which he could have reason to believe that the franchise in question had been usurped. We do not think the petition sufficiently shows these facts. It is not a question whether such petition sufficiently shows that such franchise has been usurped, but whether such facts were laid before the district attorney at the time he refused to bring the action in *quo warranto*. The petition before us shows that all that was presented to the district attorney was a verified complaint to be filed by the district attorney in the proposed *quo warranto* action. This complaint, while perhaps sufficient as a pleading in such action, which we do not pass upon, did not contain allegations sufficient to show the district attorney that the franchise was being usurped. We cannot say that from such complaint the district attorney had reason to believe that the franchise was being usurped, and should therefore have instituted the action in *quo warranto*.

The demurrer to the petition will be sustained, with leave to the petitioner to amend the petition, or to bring such further proceedings as he may be advised.

[Criminal No. 171. Filed March 26, 1904.]

[76 Pac. 458.]

JOHN EDWARDS, Defendant and Appellant, v. TERRITORY OF ARIZONA, Plaintiff and Respondent.

1. CRIMINAL LAW—MURDER—CORPUS DELICTI—ELEMENTS.—In felonious homicide the *corpus delicti* consists of two elements: First, the fact of death, as the result; second, facts and circumstances showing the criminal agency of the person charged with the crime as the means.

2. **SAME — SAME — SAME — EVIDENCE — SUFFICIENCY.**—Evidence reviewed and held sufficient to show that decedent was murdered and by the defendant.
3. **SAME — SAME — SAME — SAME — CIRCUMSTANTIAL — COMPETENCY — SUFFICIENCY.**—There being direct proof of the death, circumstantial evidence tending to show the defendant's criminal agency is competent and is sufficient where each fact necessary to be established has been proved by competent evidence beyond a reasonable doubt.
4. **SAME — TRIAL — NEGLIGENCE OF DEFENDANT'S COUNSEL — NOT GROUND FOR NEW TRIAL.**—That the former counsel for the defendant, who tried the case in the court below, neglected to introduce evidence at hand favorable to defendant, or in other respects conducted the case in an unskillful manner, is no ground for a reversal.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. Fletcher M. Doan, Judge. Affirmed.

The facts are stated in the opinion.

W. P. Miller, for Appellant.

E. W. Wells, Attorney-General, for Respondent.

KENT, C. J.—About the 1st of December, in the year 1901, the dead body of a man was found about a mile southeast from Wilcox, in this territory, in a ravine or draw several hundred yards from the main road running southeast from Wilcox. The body was that of a Mexican from forty-five to fifty years of age, and, when found, was dressed and wrapped in a blanket and canvas, one end of the canvas being pulled together at the corners and tied with a baling wire; the body being completely covered with the canvas and blanket, excepting the feet, which were exposed, one foot without shoe or stocking, and one completely destroyed, apparently by animals. The state of the body showed that death must have occurred at least several weeks before the discovery. A deep wound or cut was found upon the head; the skull from above one eye down towards the opposite cheek having been, as described by witnesses, "smashed in—cut in some two or three inches,"—and, as testified to, the wound was such as might have been made with a blunt instrument, such as the head of an ax, and would have caused death. There was blood all about

the head and body. We think the testimony as to the position of the body, the place where it was found, the manner in which it was wrapped, and its condition, was clearly sufficient to show that the deceased did not die a natural death, but that he met his death by violence at the hands of some person, and that the body after death had been tied up and placed in the position in which it was found.

The evidence introduced for the purpose of connecting the defendant with the killing was substantially as follows: The body was subsequently fully identified as that of one Eduardo de Sanchez. The wife of the deceased testified she last saw him alive on the 15th of October, 1901, when he left her at Metcalfe to go to Wilcox, taking with him seven burros and a bay mare belonging to him. Another witness testified that early in October, 1901, he saw the defendant, with a Mexican, on the Frisco River, going towards Wilcox, the two having a bunch of burros, a sorrel horse, and a bay mare; that some two weeks or more afterwards he again saw the defendant with the same burros and the same horse and mare, but this time the Mexican was not in his company; that the witness traded with the defendant, exchanging a wagon for the horse and the mare; that he then said to the defendant, "I don't want any Mexican coming in and claiming these horses," and the defendant replied, "No damn Mexican will ever claim them horses." Another witness testified that in the month of October, 1901, he saw the defendant and a Mexican answering the description of the deceased, with a bunch of burros,—seven or eight or ten,—with a horse and a mare, camped near a ranch about twenty-two miles north from Wilcox; that, in conversation with the defendant, the latter told him that he was going to Chiricahua Mountains to pack ore; that the burros belonged to the Mexican, but that he had the contract, and the Mexican was going to pack the ore; that the following morning the defendant and the Mexican went on south towards Wilcox; that some thirty-six hours afterwards the defendant returned, coming north, with the bunch of burros, the Mexican not being with him; and, when asked by the witness where he was going, the defendant said he was going to Clifton to pack wood; that he did n't get the contract to pack ore; that he had bought the Mexican's outfit and was going to Clifton. The witness further testified that the road and the distance to

Wilcox were such that a man with a bunch of burros could go to Wilcox and back to the place where the witness was within thirty-six hours. Another witness testified that somewhere towards the end of October, 1901,—the date being uncertain,—he saw the defendant and a Mexican camped some hundred yards or so from the ranch of one Fulghum, a quarter of a mile southeast from Wilcox. The body of the deceased was subsequently found about three quarters of a mile southeast from this camp. There was no direct evidence from any witness that the body found was that of the Mexican seen by the witnesses in the defendant's company, and the most that can be said of the descriptions given of the Mexican seen with the defendant is that they correspond in general, as to age and appearance, with the descriptions given of the deceased in that respect. A clerk in a store in Wilcox testified that on the 25th of October, 1901, he saw the defendant passing his store in Wilcox, going north, with seven burros, and, in response to a question as to where he got the burros, the defendant replied that he had owned them for a long time; that he was going with them to Clifton. The witness testified that he asked the question of the defendant because a short time before the defendant had told the witness that he owned nothing in the world but two horses. A woman testified that about the 26th or 27th of October, 1901, the defendant came to her house, fifteen miles from Clifton, for dinner. He then had six or seven burros; that, as he was leaving, he came back for an ax he had forgotten, and said that he had killed one Mexican with it, and might have to kill another, and offered to show the witness the blood-stains on the ax. Other witnesses testified to the sale of seven burros by the defendant, and gave descriptions of them corresponding in general with the description given by the wife of the deceased of the burros owned by him. At the time of his arrest, on January 8, 1902, a witness testified that the defendant stated that he had purchased the burros from a Mexican, and gave the Mexican's name as Sanchez; that he (the defendant) had owned the burros for two years, and that he had brought them down to Wilcox from St. Johns or somewhere in that country; that he had not seen Sanchez for two years; that the Mexican he was with near Wilcox was named Morales. The defendant introduced two witnesses, mother and daughter,—the former

the wife of the defendant,—who testified that they met the defendant on the twenty-fifth day of October, 1901, on the road some fifteen miles from Clifton, Clifton being approximately seventy-five miles from Wilcox; and the mother testified that she had not seen the defendant for a month or so previous to that time; that she went with the defendant on to Clifton, and that on the day following the day she met the defendant they were married in Clifton by a Mr. Wright. A marriage license dated October 26, 1901, together with a certificate of marriage showing that the defendant and the witness were married on October 30, 1901, by one A. Wright, a justice of the peace, was also introduced. There was no other evidence introduced by the defendant.

In felonious homicide the *corpus delicti* consists of two elements: First, the fact of death, as the result; second, facts and circumstances showing the criminal agency of the person charged with the crime, as the means. *Ruloff v. People*, 18 N. Y. 192. In the case at bar the death and the identity of the deceased were fully established by direct proof, and the facts respecting the condition of the body justified the court in submitting the question to the jury as to whether death was the result of a criminal agency, and warranted the jury in so finding. The evidence connecting the defendant with the commission of the crime, apart from his own statements, is purely circumstantial. There being direct proof of the death, circumstantial evidence tending to show the defendant's criminal agency is competent. The question that arises is as to its sufficiency. The rule in that respect is that each fact necessary to the conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt. All these facts must be consistent with each other and with the main fact sought to be proved, and the circumstances, taken together, must be of a conclusive nature, leading, on the whole, to a satisfactory conclusion, and produce, in effect, a reasonable moral certainty that the accused, and no other person, committed the offense charged. The facts proved must not only point to the guilt of the person charged, but they must be inconsistent with his innocence. *Commonwealth v. Webster*, 5 Cush. 295, 52 Am. Dec. 711; *People v. Bennett*, 49 N. Y. 137. We think the facts adduced upon the trial, together with the statements testified to as being made by the

defendant, bring the case within the requirements of the rule, and warranted the submission to the jury of the question whether the crime was committed by the defendant, as charged, and that the verdict reached by them is fairly supported by the evidence.

In his brief, counsel for the appellant suggests that certain testimony given by witnesses for the prosecution is contradictory of evidence given by them on a former trial. This evidence was not sought to be brought out in the court below, nor is the evidence upon the former trial before us, nor any error assigned in respect thereto. We can therefore give it no consideration. Nor is the fact, if it be a fact, that the former counsel for the defendant, who tried the case in the court below, neglected to introduce evidence at hand favorable to the defendant, or in other respects conducted the case for his client in an unskillful manner, ground for a reversal of the judgment in this court. We perceive no error in the record, and the judgment of the district court is therefore affirmed.

Sloan, J., and Davis, J., concur.

[Civil No. 802. Filed March 26, 1904.]

[76 Pac. 460.]

C. E. HOWARD, Defendant and Appellant, v. E. B. PERRIN, Plaintiff and Appellee.

1. EJECTMENT — UNOCCUPIED LAND — POSSESSORY RIGHT — REV. STATS. ARIZ. 1887, PAR. 2222 (AMENDED BY ACT NO. 79, p. 97, LAWS 1893, AND INCORPORATED IN REV. STATS. ARIZ. 1901 AS PAR. 3525), CONSTRUED AND HELD TO APPLY ONLY TO UNOCCUPIED GOVERNMENT LAND.—The statute, *supra*, providing that all persons settling upon public land with the view of acquiring title thereto shall be protected in the peaceable possession to the extent of one hundred and sixty acres, gives to settlers the right to hold solely by possession where the land is unoccupied government land, and has no application to unoccupied land in private ownership.
2. WATER AND WATER-RIGHTS — STREAMS — SURFACE — UNDERGROUND — APPROPRIATION — PERCOLATING WATERS — REV. STATS. ARIZ. 1887, PAR. 3199, SEC. 1, PAR. 3201, SEC. 3, AND LAWS 1893, ACT NO. 86, p. 135, CITED AND CONSTRUED.—Under the statutes, *supra*, relating

to the appropriation of water for beneficial purposes, the water of all streams flowing in a well-defined channel, whether on the surface or underground, is subject to appropriation. Percolating waters are the property of the owner of the soil.

3. **SAME — SAME — UNDERGROUND — EVIDENCE — BURDEN OF PROOF.**—The burden of proving that underground waters flow in a natural channel between well-defined banks rests upon the person asserting it.
4. **APPEAL AND ERROR — EVIDENCE — WEIGHT OF EVIDENCE — WILL NOT BE DISTURBED.**—Where the burden of proof to establish a given fact is upon a party, unless the evidence is such as to prove clearly and conclusively the fact for which it was offered, the finding of the trial court against the establishment of such fact will not be disturbed on appeal.
5. **INTEREST — RATE ON JUDGMENT — REV. STATS. 1901, PAR. 2774, CITED.**—The legal rate of interest upon judgments under the statute, *supra*, is six per cent per annum.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Coconino. R. E. Sloan, Judge. Modified.

E. E. Ellinwood, and W. C. Campbell, for Appellant.

Underground water flowing in a defined channel is subject to appropriation. *Cross v. Kitts*, 69 Cal. 222, 58 Am. Rep. 558, 10 Pac. 409; *Lord v. Meadville Water Co.*, 135 Pa. St. 122, 20 Am. St. Rep. 864, 19 Atl. 1007, 8 L. R. A. 202; *Metcalf v. Nelson*, 8 S. Dak. 87, 59 Am. St. Rep. 746, 65 N. W. 911.

H. F. Ashhurst, and E. M. Doe, for Appellee.

In all the states and territories, whether the common-law doctrine of riparian rights or the Pacific Coast doctrine of appropriation obtains, the decisions are uniform, to the effect that percolating waters are the property of the owner of the soil, only one exception being anywhere recognized, that being the case of known subterranean streams or rivers flowing in natural channels between well-defined banks, which are subject to the same rules as surface streams. *Barkley v. Wilcox*, 86 N. Y. 143, 40 Am. Rep. 519; *Bloodgood v. Ayers*, 108 N. Y. 404, 2 Am. St. Rep. 443, 15 N. E. 433; *Haldeman v. Bruckhart*, 45 Pa. St. 514, 84 Am. Dec. 511; *Greenleaf v. Frances*, 18 Pick. 117; *Chatfield v. Wilson*, 28 Vt. 49; *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352; *Frazier v. Brown*, 12 Ohio

St. 294; *Dickinson v. Grand Junction Canal Co.*, 9 Eng. Law & Eq. Rep. 521; *Case v. Hoffman*, 100 Wis. 314, 44 L. R. A. 728, 72 N. W. 390, 74 N. W. 220, 75 N. W. 945; *Tampa Water Works Co. v. Cline*, 37 Fla. 586, 53 Am. St. Rep. 262, 33 L. R. A. 376, 20 South. 780; *Gould v. Eaton*, 111 Cal. 639, 52 Am. St. Rep. 201, 44 Pac. 319; *West v. Taylor*, 16 Or. 165, 13 Pac. 665; *Willow Creek Irrigation Co. v. Michaelson*, 21 Utah, 248, 81 Am. St. Rep. 687, 60 Pac. 943, 51 L. R. A. 280; *Crescent Min. Co. v. Silver King Co.*, 17 Utah, 444, 70 Am. St. Rep. 810, 54 Pac. 244; *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299; *Acton v. Blundell*, 12 Mees & W. 324; *Taylor v. Welch*, 6 Or. 199; *Southern Pacific R. R. Co. v. Dufour*, 95 Cal. 615, 30 Pac. 783, 19 L. R. A. 92; *Ocean Grove v. Asbury Park*, 40 N. J. Eq. 447, 3 Atl. 168; *Village of Delhi v. Youmans*, 45 N. Y. 362, 6 Am. Rep. 100; *Williams v. Ladew*, 161 Pa. St. 283, 49 Am. St. Rep. 891, 29 Atl. 54; *Mosier v. Caldwell*, 7 Nev. 363; *Chase v. Silverstone*, 62 Me. 175, 16 Am. Rep. 419; *Chatfield v. Wilson*, 28 Vt. 49.

DOAN, J.—The appellee, E. B. Perrin, brought an action in ejectment in the lower court against C. E. Howard for the northwest quarter of section 15, township 25 north, range 3 west, in Coconino County, Arizona, based upon a record title in himself through mesne conveyances from the government. The appellant, C. E. Howard, in his answer claimed the property by right of possession only for a period of more than two years after plaintiff's right of action accrued and prior to the bringing of suit, and set up the statute of limitations in bar of the action. Defendant, as cross-complainant, further alleged in a cross-complaint that there was a subterranean stream of water running in a well-defined channel through and under the premises, and that prior to any public survey of the said land one J. W. Abshire appropriated all of the said waters for beneficial purposes; that the cross-complainant purchased the right of the said Abshire, and thereafter, on the sixteenth day of July, 1895, and prior to any public survey of the land, appropriated all of the said waters in conformity with the provisions of the statutes at that time existing, constructed pipe-lines and reservoirs, and applied said water to domestic, stock, and other beneficial purposes, and had thus used the said water and all thereof since the said appropria-

tion; that the use of the land in controversy is necessary to the cross-complainant for the maintenance and complete use and enjoyment of the water and waterways thus appropriated and used by him; and asked,—1. That the cross-complainant be decreed to be the owner by right of appropriation of all the water flowing into and through said subterranean stream or channel, and entitled to the exclusive use and benefit thereof; 2. That defendant and cross-complainant be decreed to have a right of way over, through, and upon the said premises for the maintenance, repair, and use of said wells, pipe-lines, and reservoirs; and 3. That the plaintiff, the appellee herein, be enjoined from in any manner interfering with defendant's and cross-complainant's use of said water and waterways and entry upon the said premises for the said purposes of use, maintenance, and repair as aforesaid.

The stipulation on file, signed by the respective parties, and the evidence introduced by the plaintiff, satisfactorily established that the land in controversy was acquired from the United States by the Atlantic and Pacific Railroad Company under the provisions of an act of Congress dated July 27, 1866, (14 Stats. 292,) and that it was conveyed by the said Atlantic and Pacific Railroad Company to the plaintiff by warranty deed dated the thirteenth day of January, 1897. It is established by the evidence that Howard's grantor went upon the land in question in 1889, when it was unoccupied and unsurveyed, and sank a well and developed a flow of water, which he conducted by means of a pipe-line to some water troughs about three hundred feet distant, and constructed a reservoir to impound the overflow, and that he used the water from such troughs and reservoir for stock purposes; that he afterwards sunk a second well, and excavated two tunnels deflecting from the sides thereof for the purpose of developing and storing a stronger flow of water, which he utilized by means of the aforesaid pipe-line, troughs, and reservoirs for stock purposes, watering and dipping sheep therein; that in the year 1892 he sold his possessory right to the premises and his improvements thereon, including the wells, troughs, pipe-line, and reservoir, to the appellant herein, who from that time had remained in possession of the premises, and continued the use of the water for these purposes, until the institution of this action. It was also established

by the evidence that the defendant, the appellant herein, on the 16th of July, 1895, posted on the dwelling-house on the premises a notice, in accordance with act 86 of the seventeenth legislature (Laws 1893, p. 135), that he had appropriated all the water in a certain defined underground channel of water, and to that end had made certain cross-cuts, a tunnel, and a well, also a certain ditch, pipe-line, and reservoir, all located at a place known as the "Abshire Place," held by him as a possessory right on unsurveyed land of the United States, and recorded a copy of said notice on said date in the public records of Coconino County, at page 63 in book 1 of "Millsites and Water-Rights." The defendant claimed no title, save such as this appropriation of water and the continuous occupation and use of the premises as a place to water stock may have given him.

The occupancy of the land by the defendant, based upon the right of possession only, does not avail against the plaintiff herein, claiming under a valid record title. Paragraph 2222 of the Revised Statutes of 1887 (afterward amended by act No. 79, p. 97, of the Laws of 1893, and incorporated in the Revised Statutes of 1901 as paragraph 3525), under which the defendant claimed to hold this land as a possessory right, by way of establishing what was therein called "possessory rights," provided: "That all persons who have heretofore or may hereafter settle upon, cultivate or improve a tract of land in this territory, with a view of acquiring title thereto under the existing laws of the United States, shall be protected in the peaceable possession and quiet enjoyment of said tract of land, with all the improvements thereon, and all the wood, timber, soil and materials growing or being thereon, to the extent of one hundred and sixty acres or one half mile square in compact form, if unsurveyed, according to the cardinal points, and, if surveyed by the United States, then according to the lines of said survey, so as to include such improvements." This law gave to settlers the right to hold solely by possession land to the extent of one hundred and sixty acres, and provided for their protection in such peaceable possession, the only two requisites being that the land thus held should be unoccupied government land belonging to the United States, and that the settler should occupy and hold the same with the view of acquiring title

thereto under the existing land laws of the United States. The statute of limitations invoked by the defendant in this instance was evidently intended by the legislature to apply to such persons, and would be available to bar an action between contesting parties of this class, wherein neither party could claim title to the premises, but each claims only the subordinate right to possession, subject to the recognized paramount title of the United States. The defendant has defined the character of his possession of this property in the notice introduced by him in evidence as posted on the dwelling-house on the premises in July, 1895, by stating that it is "the place known as the 'Abshire Place,' held by me as a possessory right . . . on unsurveyed land of the United States." But the establishment of the fact that the premises in question were not public lands of the United States at the time they were settled upon by the defendant has excepted him from the provisions of that law, it being impossible to acquire title under United States land laws to other than United States public lands. The lower court found as a fact "that the said land was, prior to the entry thereon of either the defendant and cross-plaintiff or his grantor, the property of the plaintiff and his grantor, and not public lands of the United States." This finding was fully sustained by the evidence as disclosed by the record, and as a conclusion of law therefrom the lower court held that "the defendant and cross-plaintiff was a trespasser upon the said land." The appellant, though he urged this defense in the lower court, seems to have abandoned it in this court, and relies upon his appropriation of water and his right to use the plaintiff's premises therefor. In his cross-complaint he alleges a prior appropriation of all the water flowing in a subterranean stream, running in a well-defined channel, under and through the premises, and its use for beneficial purposes, and the necessary use and occupancy of the land in controversy for the complete use and enjoyment of the water thus appropriated.

The Revised Statutes of 1887 provide:—

"(3199) Section 1. All rivers, creeks, and streams of running water in the territory of Arizona are hereby declared public and applicable to the purposes of irrigation and mining as hereinafter provided."

“(3201) Section 3. All the inhabitants of this territory who own or possess arable and irrigable lands, shall have the right to construct public or private acequias and obtain the necessary water for the same from any convenient river, creek or stream of running water. . . .”

Act 86 of the seventeenth legislature (Laws 1893, p. 135), under which this appropriation was alleged to have been made, further provides:—

“Section 1. That any person shall have the right to appropriate any of the unappropriated waters, or the surplus or flood-waters in this territory for domestic, stock and other beneficial purposes, and such person for the purpose of making such appropriation shall have the right to construct and maintain reservoirs, ditches and all other necessary waterways, and the person first appropriating waters for such purposes shall always have the better right to the same.

“Section 2. Every person who shall desire to appropriate any of the waters of this territory for the uses and purposes mentioned in section one of this act, shall first post at the place of diversion, on the stream or streams as the case may be, a notice of his appropriation. . . .”

The determination of this case depends upon whether the water developed and used by the cross-complainant and claimed to have been appropriated by him constituted a running stream flowing in natural channels between well-defined banks, such as is contemplated by the provisions of our statutes as cited herein, and therefore the subject of appropriation, or whether it was, on the contrary, filtrating or percolating water oozing through the soil beneath the surface in undefined and unknown channels, and therefore a component part of the earth, having no characteristic of ownership distinct from the land itself, and therefore not the subject of appropriation by another, but belonging to the owner of the soil. Throughout the Pacific Coast, where the doctrine of appropriation obtains, the decisions are uniform to the effect that waters percolating generally through the soil beneath the surface are the property of the owner of the soil, but that subterranean streams, flowing in natural channels, between well-defined banks, are subject to appropriation under the same rule as surface streams. The law on this subject has been correctly stated by the appellant in

his brief: "No distinction exists between waters running under the surface in defined channels and those running in distinct channels upon the surface. The distinction is made between all waters running in distinct channels, whether upon the surface or subterranean, and those oozing or percolating through the soil in varying quantities and uncertain directions." *Strait v. Brown*, 16 Nev. 317, 40 Am. Rep. 497. He claims, however, that the evidence was clear and conclusive that the water in question was "a subterranean stream, with well-defined channel and banks," and that "the court erred in finding that the water in question was not a flowing stream with well-defined channel or banks." This presents solely a question of fact, both parties agreeing as to the law in the premises. The defendant having alleged in the cross-complaint that there was a subterranean stream of water running in a well-defined channel, the burden of proof was upon him to establish that fact by competent evidence. In such cases the rule invariably followed by appellate tribunals is that, unless the evidence was such as to prove clearly and conclusively the fact for which it was offered, the finding of the trial court against the establishment of such fact will not be disturbed on appeal. We have examined the evidence in this case, and do not see how the court could have found, from the evidence in the case, other than it did. We fail to find sufficient evidence in the testimony of the witnesses of the appellant to establish the existence of "a subterranean stream with well-defined channel or banks," even if no consideration were given to the contradictory evidence introduced by the opposite party.

We find nothing in the record to justify the reversal of the decision of the lower court or to necessitate a retrial of the case. Our attention has been called to the allowance of interest by the lower court at the rate of seven per cent per annum upon the judgment. This was clearly error. The legal rate of interest for judgments under the Revised Statutes of 1901 (par. 2774), which were in force at that time, was six per cent per annum. The judgment will be modified to that effect. The case will be remanded to the lower court, with the direction to enter the judgment bearing interest at the rate of six per cent per annum, as indicated herein.

Kent, C. J., and Davis, J., concur.

[Civil No. 842. Filed March 26, 1904.]

[76 Pac. 463.]

E. C. AVERYT, Defendant and Appellant, v. FRANK WILLIAMS, Plaintiff and Appellee.

1. **ELECTIONS—CONTEST—EVIDENCE—BALLOTS—REGULARLY PRESERVED—ADMISSIBILITY.**—Where ballots are preserved in strict accordance with statutory requirements (Rev. Stats. 1901, chap. 10) they are admissible without further proof, and furnish the primary and controlling evidence of the number of votes cast for the respective candidates.
2. **SAME—SAME—EVIDENCE—IRREGULARLY PRESERVED—ADMISSIBILITY—BURDEN OF PROOF AS TO IDENTITY—REV. STATS. ARIZ. 1901, PARS. 2389, 2395, DIRECTORY.**—The statute, *supra*, requiring that the ballots should be strung, placed in a sealed envelope, indorsed by each member of the election board writing his name across the seal, delivered by some member of the board to the clerk of the board of supervisors, and by him to the county treasurer, is not mandatory, but directory. Where ballots have been irregularly preserved, to render them admissible the burden is upon the party offering them to show that they are the identical ballots cast. The proof must be clear and satisfactory, but the mere fact that they might have been tampered with will not warrant rejection.
3. **SAME—SAME—SAME—PRESERVATION—QUESTION OF FACT—APPEAL AND ERROR—REVIEW.**—The question of the preservation of ballots in their integrity is one of fact to be determined by the trial judge, and a finding thereon will not be disturbed unless not supported by the evidence.
4. **SAME—APPEAL AND ERROR—BILL OF EXCEPTIONS—RECORD.**—An assignment of error that the trial court erred in refusing to strike out ballots as evidence on the ground that they did not purport to be official ballots cannot be considered where the ballots are expressly excluded from the bill of exceptions and the record does not disclose whether the ballots were or were not official.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. Richard E. Sloan, Judge. **Affirmed.**

The facts are stated in the opinion.

H. S. Clark, for Appellant.

As between the ballots cast at an election and the canvass of these ballots by the election officers, the former are the primary and controlling evidence.

In order to continue the ballots as controlling evidence, it must appear that they have been preserved in the manner and by the officers prescribed by the statute, and that while in such custody they have not been so exposed to the reach of unauthorized persons as to afford a reasonable probability of their having been changed or tampered with. This is a rule as stated by Judge Brewer and cited with approbation in Illinois and several other states. *Hudson v. Solomon*, 19 Kan. 177; *Howser v. Pepper*, 8 N. D. 484, 79 N. W. 1018; *Dooley v. Van Hohenstein*, 170 Ill. 630, 49 N. E. 193; *Kingery v. Berry*, 94 Ill. 515; Cooley on Constitutional Limitations, 6th ed., 788; McCreary on Elections, 4th ed., par. 471; *Murphy v. Battle*, 155 Ill. 182, 49 N. E. 470; *Beall v. Albert*, 159 Ill. 127, 42 N. E. 166; *Catron v. Craw*, 164 Ill. 20, 46 N. E. 3; *Bonney v. Finch*, 180 Ill. 133, 54 N. E. 318; *Eggers v. Fox*, 177 Ill. 185, 52 N. E. 269.

Henry T. Andrews, and Samuel L. Pattee, for Appellee.

That the ballots themselves are sufficient evidence, if properly admitted, to overthrow the returns of the canvassing board, and that no other evidence need be given, is well settled. *Schneider v. Bray*, 22 Nev. 272, 39 Pac. 326.

Statutory provisions as to the preservation of ballots are not mandatory, but merely directory. *People v. Higgins*, 3 Mich. 233, 61 Am. Dec. 491; *Hughes v. Holman*, 23 Or. 481, 32 Pac. 298.

KENT, C. J.—The appellant and appellee were rival candidates for the office of city assessor and tax-collector of the city of Prescott. As a result of the election, the appellant was declared to have received six more votes than the appellee. The appellee having instituted statutory proceedings in the court below to contest the election, the court, on a recount of the ballots, found that the appellee had received ten more votes than the appellant, and entered judgment declaring that the appellee had been elected to the office. Upon the trial it appeared that certain provisions of the statute respecting the method of preserving the ballots had not been complied

with, and the contestee, the appellant in this court, duly objected on that ground to the admission by the trial court of the ballots in evidence, and now by this appeal brings before us for review the action of the trial court in that respect.

Our statutes (Rev. Stats. Ariz. 1901, tit. 20, chap. 10) provide in detail the various steps to be taken in canvassing, returning, and preserving the votes given at an election. Among other provisions are the following: The tickets, as soon as read, must be strung on a string by one of the judges, and must not thereafter be examined by any person, but must, as soon as all are counted, be carefully sealed in a strong envelope, each member of the board writing his name across the seal. The package so sealed must, before the election board adjourns, be delivered to one of its members, to be determined by lot or otherwise, who must, without delay, deliver such package to the clerk of the board of supervisors at his office, and upon receipt of the package the clerk must deposit it in the safe of the county treasurer, who must keep it unopened and unaltered for six months, after which time, if there is no contest commenced, he must burn the package without opening or examining the contents. The evidence adduced at the trial showed that the election was held on January 6, 1903, at a building known as Odd Fellows' Hall. Immediately after the close of the balloting, the election board, composed of the city council of Prescott, took the ballot-box to the city hall, and there the ballots were counted, two of the members of the council calling off the ballots and handing them to the mayor, who replaced them in the ballot-box. The box was a steel or iron box having a slit at the top, with a lid which, when the box was locked, covered the only opening in the box completely. The box had two locks, with one key to each lock. At the close of the count the ballots were placed in the box folded, and the box locked and the opening completely closed. The ballots were not strung nor sealed in an envelope, nor were the names of the judges of election indorsed upon the box, or otherwise. The mayor then took the key to one lock, and one of the councilmen the key to the other lock, and these keys remained in their possession and upon their persons until produced in court at the time of the hearing of the contest. After being locked,

the box remained for ten days in the office of the city clerk, who was not an election officer, the box being placed and remaining on the top of a safe in the main office, to which office four persons only had keys,—to wit, the city clerk, the chief of police, the night watchman, and the city assessor (the appellant),—the room being kept locked in their absence. All four testified that while the box remained in the room there was no change in its condition to their knowledge. Subsequently, about ten days after the election, the city council met as a canvassing board, and canvassed the result of the election, but did not reopen the box, and immediately after the canvass the box containing the ballots was taken by the city clerk to the office of the county treasurer and placed in the vault in his office, to which only the treasurer and his deputy had access. The treasurer testified that no change was made in the condition of the box or the ballots from the time they were delivered to him until they were produced by him in court at the hearing of the contest. There was no evidence that there had been any change in or tampering with the ballots. It therefore appears that the provisions of the statute requiring that the ballots be strung, that they be placed in a sealed envelope, that each member of the election board write his name across the seal, and that on receipt by him the ballots be delivered by the clerk to the county treasurer, were not complied with; and the question to be determined is whether such failure to comply with the requirements of the statute rendered the ballots inadmissible in evidence to contradict or overcome the return of the election officers.

Where an election is contested, our statutes provide for the opening by the tribunal by which the contest is proceeding of the package containing the ballots cast at the election, to the end that evidence may be had of its contents. Rev. Stats. 1901, par. 2396. Where the ballots are preserved in strict accordance with the statutory requirements, they are admissible in evidence without further proof; and, when so admitted, furnish the primary and controlling evidence of the number of votes cast for the respective candidates, and are sufficient in themselves, without further evidence, to contradict and overthrow the returns of the election officers or canvassing board. *Schneider v. Bray*, 22 Nev. 272, 39 Pac.

326; *People v. Holden*, 28 Cal. 123; *Hudson v. Solomon*, 19 Kan. 177. Where the ballots have not been preserved in strict compliance with the statutory requirements, such non-compliance does not of itself render the ballots inadmissible in evidence, for the provisions of the statute in this respect are not mandatory, but directory. The object of the Election Law is to prevent fraud, and to guaranty to the voter the registration and count of his ballot. A construction of the statute that would render it impossible to ascertain the will of the voter as expressed by his ballot, without fault on his part, and would make that ballot inadmissible in evidence solely because of the action of the election officials in failing to comply with certain of the requirements of the statute in respect to the manner of preservation of the ballots, would make it possible for such officers to nullify the will of the voter, or of any number of voters, by a simple departure from some of the requirements of the statute, and would tend to defeat the object of the law. We think that where the requirements of the statute with respect to the method of preservation of the ballots have not been complied with, the object of the statute, to give effect to the expression of the will of the voter, is best subserved by holding that such non-compliance does not necessarily make the ballots inadmissible in evidence, but the burden of proof in such case is cast upon the party offering to introduce them in evidence to show that the ballots offered are the identical ballots cast at the election, and that there is no reasonable probability that the ballots have been disturbed or tampered with; and, if it appears that the ballots are before the court in their integrity, they should be admitted in evidence. The question as to the preservation of the ballots in their integrity is a question of fact to be determined by the trial court as other questions of fact, and the finding thereon is to be reviewed by this court as are findings on other similar questions of fact. The fact that the ballots were so kept as to render it possible that they might have been tampered with is not a fact sufficient in itself to warrant their rejection in evidence; and, while the ballots should not be so received in evidence except upon clear and satisfactory proof of their identity, and similar proof that the circumstances surrounding their keeping were such as to cast no suspicion upon their integrity, when they

have been so admitted this court will not disturb the ruling of the trial court, unless we are satisfied that the finding in that respect is not supported by the evidence.

We find authority in numerous cases for the views we have expressed, among others the following: *Hughes v. Holman*, 23 Or. 481, 32 Pac. 298; *Mallett v. Plumb*, 60 Conn. 352, 22 Atl. 772; *People v. Livingston*, 79 N. Y. 279; *People v. Higgins*, 3 Mich. 233, 61 Am. Dec. 491; *Coglan v. Beard*, 67 Cal. 303, 7 Pac. 738; *Tebbe v. Smith*, 108 Cal. 101, 41 Pac. 454, 29 L. R. A. 673, 49 Am. St. Rep. 68; *Henderson v. Albright*, 12 Tex. Civ. App. 368, 34 S. W. 992; *O'Gorman v. Richter*, 31 Minn. 25, 16 N. W. 416; *Dorey v. Lynn*, 31 Kan. 758, 3 Pac. 557; *Bowers v. Smith*, 111 Mo. 45, 33 Am. St. Rep. 491, 16 L. R. A. 754, 20 S. W. 101. In the case at bar the evidence fairly shows that there was no reasonable probability that the ballots had been changed or tampered with, and that they were before the court in their integrity; and, indeed, that such was the fact was practically admitted by counsel for the contestee in the lower court, the claim being there made, and here urged, that as there had been opportunity given for such tampering, and such opportunity was afforded by the failure of the election officers to comply with the requirements of the statute, such opportunity and such failure being shown, the ballots were thereby rendered inadmissible in evidence. With this view we do not agree. Under the evidence in the case, there being nothing tending to show that any of the ballots had been actually altered or changed after being deposited by the voter, and the circumstances surrounding the keeping of the ballots being of such a nature as to warrant the conclusion that there was no reasonable probability of there having been any alteration, but only a possible opportunity for such alteration, we think there was no other course open for the trial court except to receive the ballots in evidence.

The appellant also assigns as error the refusal of the trial court to strike out the evidence of the ballots, on the further ground that the ballots did not purport to be official ballots. The ballots are not before us, and they were expressly excluded from the bill of exceptions, as appears by the certificate thereto attached, and there is nothing in the record from which we can determine whether the ballots were or were

not official. We have therefore nothing before us upon which to consider the error assigned.

The judgment of the district court is affirmed.

Davis, J., and Doan, J., concur.

[Civil No. 829. Filed March 26, 1904.]

[76 Pac. 465.]

C. W. JOHNSTONE, Plaintiff and Appellant, v. J. H. ROBERTSON, Defendant and Appellee.

1. ELECTIONS — CHANGE OF POLLING-PLACE — REV. STATS. ARIZ. 1901, PARS. 2305, 2306, HELD MANDATORY.—Paragraph 2305, *supra*, provides that the board of supervisors must at least fifteen days prior to an election designate the place within each precinct where it shall be held. Paragraph 2306, *supra*, provides that if it cannot be held at the place designated, the justice of the peace or the election board must two days before the election designate the place by written notice. These provisions are mandatory. The action of an election board in holding an election at a ranch house instead of at the schoolhouse designated by the supervisors, without any attempt to comply with the requirements of the law relative to a change of the polling-place, and without any necessity or sufficient reason appearing to justify it, renders the election held there invalid, and the votes cast in that precinct cannot be counted.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Edward Kent, Judge. Affirmed.

The facts are stated in the opinion.

C. F. Ainsworth, for Appellant.

The court erred in refusing to admit in evidence the votes cast in Phoenix Precinct No. 4, at polling-place in school district No. 35, for the reason that the said votes were legally cast there and were proper and material evidence in this contest, and should have been counted by the court. *Dale v. Irwin*, 78 Ill. 170; *Preston v. Culbertson*, 58 Cal. 198; *Far-*

rington v. Turner, 53 Mich. 27, 51 Am. Rep. 88, 18 N. W. 544; *Whipley v. McKune*, 12 Cal. 352; *People v. Cook*, 14 Barb. 290; *Holland v. Osgood*, 8 Vt. 280; *Corliss v. Corliss*, 8 Vt. 373; *Marchant v. Langworthy*, 6 Hill, 646; *People v. Cook*, 14 Barb. 259; *People v. Vail*, 20 Wend. 12; *People v. Cicott*, 16 Mich. 283, 97 Am. Dec. 141; *Election case of Wheelock*, 82 Pa. St. 297; *Simons v. People*, 119 Ill. 617, 9 N. E. 220; *Steele v. Calhoun*, 61 Miss. 556; *Wakefield v. Patterson*, 25 Kan. (709) 495; *Broadhead v. City of Milwaukee*, 19 Wis. 624, 88 Am. Dec. 711.

If the law itself declares a specified irregularity to be fatal, the courts will follow that command, and in that sense such laws are strictly mandatory; but in the absence of such declaration the judiciary endeavor as best they may to discern whether the deviation from the prescribed form had or had not so vital an influence upon the proceeding as probably prevented a free and full expression of the popular will. If it had, the irregularity is held to vitiate the entire return; otherwise, it is considered immaterial. Courts justly consider the chief purpose of such laws—namely, to obtain a fair election and an honest return—as paramount in importance to the minor requirements which prescribe the formal steps to reach an end, and in order not to defeat the main design are frequently led to ignore such innocent irregularities of election officers as are free of fraud if they do not interfere with the full and fair expression of the voters' choice. *Bowers v. Smith*, 111 Mo. 45, 33 Am. St. Rep. 491, 16 L. R. A. 754, 20 S. W. 101; *Davis v. State*, 75 Tex. 420, 12 S. W. 957; *Stemper v. Higgins*, 38 Minn. 222, 37 N. W. 95; *Parvin v. Wimberg*, 130 Ind. 561, 30 Am. St. Rep. 254, 15 L. R. A. 775, 30 N. E. 790; *City of Chicago v. People*, 80 Ill. 496; *Peard v. State*, 34 Neb. 372, 51 N. W. 828; *Ex parte White*, 33 Tex. Cr. 594, 28 S. W. 542; *Roper v. Scurlock*, 29 Tex. Civ. App. 464, 69 S. W. 456.

Walter Bennett, for Appellee.

That the changing of the place for holding the election in the manner done in this case was illegal, see *Knowles v. Yates*, 31 Cal. 83; *Tebbe v. Smith*, 108 Cal. 111, 112, 49 Am. St. Rep. 68, 41 Pac. 454, 29 L. R. A. 673; *Atkinson v. Lorbeer*, 111 Cal. 424, 44 Pac. 162; *Russell v. McDowell*, 83 Cal.

70, 23 Pac. 183; *Melvin's Case*, 68 Pa. St. 333; *Heyfron v. Mahony*, 9 Mont. 497, 24 Pac. 93; *Williams v. Potter*, 114 Ill. 628, 3 N. E. 729; *Snowball v. People*, 147 Ill. 260, 35 N. E. 538; *Morrison v. Markham*, 78 Ga. 161, 1 S. E. 425.

DOAN, J.—This is a contest of the election of the appellee, J. H. Robertson, to the office of justice of the peace of Phoenix Precinct, at the general election held November 4, 1902. The only question involved in this appeal is the admissibility of the votes cast at school district No. 35, that being one of the polling-places within the election precinct designated as "Phoenix Precinct No. 4." All the votes were recounted by the court. No question is now raised by appellant as to the action of the court in admitting or rejecting any of the other ballots offered in evidence, but merely as to the action of the court in rejecting the twenty ballots found by the court to be valid as far as their form is concerned, which were cast at school district No. 35, and which the court rejected because there was a non-compliance with the law, in the opinion of the court, in that particular polling or election precinct, in that the votes were received at a place other than the one designated by the board of supervisors as a polling-place in that precinct. The place designated was the schoolhouse in school district No. 35, and the place where the votes were actually cast and received was at a house known as "Heard's Ranch House," in the same precinct, but about half a mile distant from the schoolhouse. It appears from the record that the regular election board as appointed by the board of supervisors presided at the election held at the ranch house, and that the proceedings were in all respects proper and regular, except as to the place of holding the election. The ranch house at which the election was held was about half a mile distant from the schoolhouse, and in plain view therefrom. The witnesses for the contestant testified that the election was not held at the schoolhouse in that precinct because school was in session there that day. The only evidence in the record of any notice given of any change in the place of holding the election was the testimony of Larsen, one of the judges of the election. He stated that "some children (who attended the school) came back by our place every day, and they were notified some six or seven days ahead." Our

statutes (Rev. Stats. 1901) provide (par. 2305): "The board must, at least fifteen days prior to an election, issue its order designating the house or place within each precinct where the election must be held." Paragraph 2306: "If the board fail to designate the house or place for holding the election, or if it cannot be held at the house or place designated, the justice of the peace in the precinct must, two days before the election, and by an order under his hand (copies of which he must at once post in three public places in the precinct), designate the house or place, or if there be no justice of the peace there, the election board, by similar notices posted as in this section provided, may designate the place." It appears from the record that the board issued its order in accordance with paragraph 2305, designating the house within this precinct where the election must be held. There is nothing in the record to indicate that the election could not have been held at the house designated, further than the opinion or conclusion of the election board; and that was evidently arrived at some days prior to the day of election, because it was stated that they notified the school children "some six or seven days ahead." It does not appear from the record that an order designating the place at which the election would be held was made by the justice of the peace in the precinct two days before the election, or that, there being "no justice of the peace there, the election board, by similar notices," posted as provided in paragraph 2306, "designated the place." It is the general rule, to which there are very few exceptions, that the statutes relative to the time and place of holding an election are mandatory, and that an election held at any other than the designated place is absolutely void without proof of any fraud or injury. The sole exceptions we have found to this rule are those cases where the impossibility of holding the election at the place fixed by law was discovered immediately before the election, at a date too late to render possible a compliance with the law in the designation of another place. *Dale v. Irwin*, 78 Ill. 170; *Preston v. Culbertson*, 58 Cal. 198. This latter feature does not enter into the case under consideration. We have no evidence in the record that the election board repaired to the schoolhouse on the day of the election, and, being unable to hold the election there, selected the ranch house for that reason. The

evidence presented by contestant that they notified the school children "six or seven days ahead" establishes the contrary, so that this cannot be considered as a case of the removal of the polling-place on the morning of election day perforce of necessity.

It is said on this subject in *Heyfron v. Mahony*, 9 Mont. 497, 24 Pac. 93, 18 Am. St. Rep. 757: "What, then, was the legal effect of the removal of the polling-place? . . . Mr. McCrary, in his work on Elections, writes: 'It must be conceded by all that time and place are of the substance of every election, while many provisions which appertain to the manner of conducting an election may be directory only.' Section 141 (3d ed.). The same opinion is expressed by Mr. Paine in his treatise on Elections: 'The requirement that the election shall be held at the place designated by law is not directory; it is mandatory, and must be obeyed.' Section 327. . . . In *Melvin's Case*, 68 Pa. 338, Mr. Chief Justice Thompson says: 'A fixed place, it seems to me, is as absolutely a requisite, according to the election laws, as is the time of voting. The holding of elections at the places fixed by law is not directory; it is mandatory, and cannot be omitted without error. I will not say that, in case of the destruction of a designated building on the eve of an election, the election might not be held on the same or contiguous ground, as a matter of necessity. "Necessitas non habet legem." But then the necessity must be absolute, discarding all mere idea of convenience. . . . To move the place of election . . . from a designated schoolhouse to a vacant house more than half a mile distant therefrom, without authority or any absolutely controlling circumstances, must render the election therein void, and, if the votes taken be counted, constitute an undue election.' See, also, McCrary, Elec. (3d ed.) secs. 123, 124; Paine, Elec. secs. 327-330. The circumstances which do not affect the result when the place designated for the holding of the election has been changed are shown in *Preston v. Culbertson*, 58 Cal. 209, wherein the court holds: 'The polls were opened a short distance from and in plain view of the place appointed, the owner of the house selected having objected to the election proceeding at his house; and it does not appear that any voter was misled or deprived of his vote by reason of the change.' *Dale v. Irwin*, 78 Ill. 180."

The appellant states that paragraphs 2305 and 2306 of our Statutes of 1901 as cited are identical with paragraphs 1131 and 1132 of the California statutes, and insists, on the authority of *Preston v. Culbertson*, 58 Cal. 198, and *Sprague v. Norway*, 31 Cal. 173, that the action of the election officers in selecting the ranch house instead of the place designated by the board was a mere irregularity, which did not affect the final result; and that, as there was no fraud shown on the part of the election officers, the voters of the district should not lose their votes, and the appellant be deprived of the benefit thereof, simply because of a technical violation of the law. The holding in California on that subject is very tersely and forcibly stated in *Russell v. McDowell*, 83 Cal. 70, 23 Pac. 183 (decided since the cases cited by appellant), as follows: "It is well settled that disregard of directory provisions of election laws, in the absence of actual fraud, is no ground for rejecting the entire vote of a precinct. . . . It is only those provisions of the statutes relating to the time and place of holding elections, the qualifications of voters, and such others as are expressly made essential prerequisites to the validity of an election, that are held to be mandatory. . . . All others are directory merely, and a failure to observe them, caused by honest ignorance or mistake, and not resulting in manifest fraud, does not afford ground for rejecting the entire vote of a precinct. . . . The law of this state is as it is everywhere else, and ought to be, that disregard of mandatory requirements of the election law, or of merely directory provisions coupled with such actual fraud as makes the true result doubtful, is ground for throwing out the entire vote of a precinct where there is no means of purging the poll." We accept this as not only a later utterance of that jurisdiction, but as more definitely decisive of the question under consideration; the use of the house designated in the case of *Preston v. Culbertson*, *supra*, as a polling-place only having been denied on the day of the election. The law is mandatory that the election must be held at the place designated by the board of supervisors, unless a change of the polling-place becomes necessary, and when such necessity is known to exist a sufficient length of time prior to the election to enable the place to which such polling-place is changed to be designated as provided by the statute, such designation must be made

in order to render valid an election held there. The action of the board in this instance in holding the election at the ranch house instead of at the place designated by the board of supervisors, without any attempt to comply with the requirements of the law relative to a change of the polling-place, and without any necessity or sufficient reason appearing to justify it, renders the election held there invalid, and the votes cast in that precinct cannot be counted.

The judgment of the lower court is affirmed.

Sloan, J., and Davis, J., concur.

[Civil No. 845. Filed March 26, 1904.]

[76 Pac. 467.]

UNITED STATES OF AMERICA, Plaintiff and Appellant,
v. WILLIAM K. MEADE, et al., Defendants and
Appellees.

1. BONDS—EVIDENCE.—In an action against the principal and co-obligors on the bond of a United States marshal, the trial court properly refused to receive as proof of the liability of the sureties the pleadings, record, and judgment in an action in the court of claims, wherein the United States had secured judgment against the marshal, there being nothing contained therein tending to show that the items for which the judgment had been rendered against the marshal were for items chargeable against him during the life of the bond.
2. SAME — PLEADING — EVIDENCE. — Where the complaint against the sureties on a United States marshal's bond alleged that the United States obtained judgment against the marshal for a certain amount advanced by the government to him during the life of the bond, and that this had not been paid, and prayed judgment for this amount, the plaintiff was limited in the proof properly adducible by it as against the defendants to such proof as would establish a judgment as pleaded in the complaint, and no evidence of liability under the bond independent of the judgment was admissible.

APPEAL from a judgment of the District Court of the First Judicial District. George R. Davis, Judge. Affirmed.

Affirmed on rehearing. Opinion 9 Ariz., 80 Pac. 326.

The facts are stated in the opinion.

Frederick S. Nave, United States Attorney, and John H. Campbell, Assistant United States Attorney, for Appellant.

Barnes & Martin, Thomas Mitchell, and Ben Goodrich, for Appellees.

KENT, C. J.—The complaint of the United States, the plaintiff in the court below, alleged that the defendant Meade and other defendants, as co-obligors, executed on the twenty-first day of August, 1886, a bond to the United States in the sum of twenty-five thousand dollars, for the faithful performance by the defendant Meade of his duties as marshal of the United States for Arizona; that on the twenty-eighth day of May, 1890, Meade filed his petition in the court of claims of the United States, praying judgment for sums claimed to be due him from the government for services rendered by him as marshal; that to this petition the government filed a counterclaim, and on December 3, 1900, the court of claims rendered its judgment dismissing the petition of the claimant Meade, and rendering judgment against Meade and in favor of the government on its counterclaim for the sum of \$2,470.32; that the sum so found to be due the government from Meade by the judgment of the court of claims represented money which had come into the hands of Meade as marshal by reason of advances made to him by the government under the bond set out in the complaint, and under bonds previously given by Meade; that, of the amount so found to be due the government, the sum of \$572 was advanced by the government during the period covered by the bond set out in the complaint, and while said bond was in force and effect; and that the money had not been paid by Meade to the government, whereby the bond had become forfeited. The complaint prayed judgment against the defendants for the sum of \$572. The answers interposed by the defendants, the co-obligors on the bond, contained a general denial of the allegations of the complaint, and affirmative allegations that they were not parties to the suit in the court of claims; that a settlement of the accounts of the defendant Meade had been

had; and that full payment had been made by Meade of all sums due from him to the government. At the commencement of the trial of the action, on motion of the plaintiff the action was dismissed as against the defendant Meade, leaving the action remaining against his co-obligors on the bond. The plaintiff called as a witness the defendant Meade, against whom the action had been dismissed, who testified that he was marshal of the United States for Arizona from August 21, 1886, to March 17, 1890; that at the expiration of his term of office he had had a settlement of his account with the government. The plaintiff then offered in evidence a certified copy of the judgment of the court of claims set up in the complaint. The court sustained the objection of the defendants to the introduction of the document in evidence. The plaintiff then offered in evidence what was termed certified transcripts of the record in the case in the court of claims in which the judgment had been rendered, to which offer the court sustained the objection of the defendants. The plaintiff then offered in evidence the same documents, but in the inverse order, to which offer the same ruling was made by the court. The plaintiff then offered in evidence a transcript of the accounts of Meade as marshal, which was also excluded by the court. The plaintiff thereupon rested, and on motion of the defendants a verdict for the defendants was directed by the court. From a judgment entered thereon, the plaintiff appeals to this court.

The question presented for our consideration by this appeal is whether the trial court erred in rejecting the documentary evidence offered by the plaintiff. The cause of action set forth in the complaint is for a breach of the bond, in the failure of Meade to account for moneys in his hands adjudged to be due from Meade to the government. If the government had obtained a judgment against Meade, based on his failure, within the life of the bond, in that respect such a judgment is clearly admissible in evidence in an action by the government against his co-obligors on the bond, as proof of the breach of the condition. *Moses v. United States*, 166 U. S. 571, 17 Sup. Ct. 682, 41 L. Ed. 1119. In the case at bar the judgment offered by the plaintiff was entitled, "William K. Meade v. The United States," and decreed "that the defendants, the United States, do have and recover on their

counterclaim the sum of \$2,470.32 of and from the said William K. Meade, the claimant." On the face of the judgment, therefore, there was nothing to show that it in any way related to the accounts of Meade as marshal, or had any reference to any moneys in his hands, or anything to do with the bond sued on, or with the subject-matter of the action. As offered, therefore, it was properly rejected. The plaintiff then offered in evidence what were termed, as appears from the abstract before us, "certified transcripts of the record in the case of William K. Meade v. The United States." Although the record is not at all clear, we judge from the brief of the appellant and from the fact that no such documents as described are to be found among the original papers in the case or in the abstract; that the document offered was the one apparently subsequently marked "Exhibit E for Identification," which was in fact a certified copy of the pleadings in a case in the court of claims bearing the same title and number as the judgment previously offered in evidence. If it be assumed that the document offered contained the pleadings in the same case in the court of claims as that in which the judgment was entered, they sufficiently show that the action related to claims and counterclaims growing out of Meade's office as marshal of Arizona. The copies of these pleadings and of the judgment based thereon, inasmuch as we do not agree with the contention of the appellee that they were not duly certified, were therefore properly admissible in evidence, provided they related to matters within the life of the bond sued on in this action. The bond sued on here was dated August 21, 1886. It appears that prior thereto Meade had been in office as marshal under other bonds covering such prior period. If, therefore, the pleadings on which the judgment of the court of claims was based do not show that the counterclaim of the government for which the judgment against Meade was entered was for items and moneys covered by the life of the bond sued on here, but covered a period not embraced by the life of the bond, the judgment and the pleadings were properly excluded by the trial court.

The pleadings sought to be introduced were—1. The petition of the claimant, Meade, filed May 28, 1890; 2. This request for findings of fact, filed February 16, 1892; and 3. The

defendant's plea of counterclaim, filed September 30, 1898; the latter containing (a) bill of particulars, (b) proof, (c) auditor's letter. The petition sets forth a claim for compensation for various services as marshal, all rendered prior to the date of the bond sued on; the dates being also shown by the findings requested by the claimant. The plea of counterclaim states that in the settlement of the claimant's accounts he was illegally credited with the sum of \$2,470.32, for which the government prayed judgment. No dates at all are given in the plea of counterclaim itself. The bill of particulars attached to the counterclaim, giving the items making up the government's counterclaim, showed that \$684.20 of the illegal credits were for services rendered in November, 1885, and that \$1,046.12 were for services rendered in February, 1886. The balance of the counterclaim—to wit, \$740—was for "fees for serving 185 warrants of commitment, at \$4 each, as shown by report from the auditor for the state and other departments, dated September 26, 1898, and filed herewith." No dates being given. This report of the auditor of state gives a number of items for service of writs of commitment, making up the total of \$740, but in no instance is any date given, or any data of any kind from which it can even be inferred that the items, or any of them, are embraced within a period of time covered by the life of the bond. The part of the counterclaim designated as the "proof" is merely a statement by an assistant attorney in the attorney-general's office that "the transcript of the marshal's accounts certified on October 10, 1890, which are too voluminous to be printed, show that the claimant was credited" with the amount claimed in the counterclaim in the settlement of his accounts. Inasmuch as there is nothing in the pleadings, the counterclaim, or the judgment in the case in the court of claims tending to show that the items for which the government recovered judgment against Meade were in fact for items chargeable to him within the life of the bond sued on here, and no other portion of the record or judgment-roll in that case being offered, we think the trial court committed no error in refusing to receive these documents in evidence as proof of any liability on the part of Meade's co-obligors upon the bond.

The appellant also urges that the trial court was in error in rejecting the transcript of the accounts of Meade as mar-

shal offered in evidence by the plaintiff. The certificate attached thereto is dated October 28, 1901, and such date shows that it was not the transcript of the accounts referred to in the "proof" attached to the counterclaim in the suit in the court of claims. It was therefore not a part of the record in that case upon which the judgment therein was founded, and could not properly be received by the court below in connection therewith. But the appellant contends that this transcript of the accounts should have been received in evidence apart and distinct from the judgment of the court of claims, and as independent proof of the liability of the defendants under the bond for the failure of Meade to account for the \$572 demanded. From an examination of the items referred to by appellant's counsel in his brief as the items in the transcript of the account relied upon by him to prove the indebtedness of Meade to the government, we are inclined to doubt the sufficiency of the proof offered to establish the facts desired; but, in any event, we think, under the pleadings in the case, the plaintiff was limited in the proof properly adducible by it as against the defendants, the co-obligors on the bond with Meade, to such proof as would establish a judgment against Meade, rendered for a failure to account during the life of the bond to the government for moneys due it as alleged in the complaint. The transcript of accounts offered has no connection with the judgment pleaded in the complaint, and was not within the issues raised by the pleadings, and was therefore properly excluded by the trial court.

The judgment of the district court is affirmed.

Sloan, J., and Doan, J., concur.

[Criminal No. 178. Filed March 26, 1904.]

[76 Pac. 469.]

JUSTIN T. HINDS, Defendant and Appellant, v. TERRITORY OF ARIZONA, Plaintiff and Respondent.

1. EMBEZZLEMENT—INDICTMENT—SUFFICIENCY—AGENT OF CORPORATION
—TRUST RELATION—REV. STATS. ARIZ. 1901, PEN. CODE, SEC. 458,

CITED.—Section 458, *supra*, provides that any officer, servant, or agent of a corporation who fraudulently appropriates to any use or purpose not in the execution of his trust any property in his possession or under his control by virtue of his trust shall be guilty of embezzlement. An indictment under said section, which charges that defendant, while acting as manager of the P. corporation, was intrusted by the S. corporation with a check, the proceeds of which he embezzled, but which, while averring the check was intrusted to him by virtue of his employment, does not allege what, if any, interest the P. corporation had in it, or that he received it for or on account of the P. corporation, but expressly avers that it was the property of the S. corporation, and that it was received by him in the name and on account of the S. corporation, is subject to demurrer, in not being direct and certain in setting out the trust relation under which the property was misappropriated.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. R. E. Sloan, Judge. Reversed.

The facts are stated in the opinion.

R. M. Ling, and J. D. Wakely, for Appellant.

Certainty is required in criminal pleadings in order to notify the defendant as well as the court of the nature of the offense charged. *Thompson v. State*, 26 Ark. 330; *Dillingham v. State*, 5 Ohio St. 280; *Cochran v. United States*, 157 U. S. 290, 15 Sup. Ct. 628, 39 L. Ed. 705.

To the end that an indictment may serve the purpose indicated, it is a general rule that it must charge all the facts and circumstances which constitute the offense, and not mere conclusions of the pleader. *Giles v. State*, 89 Ala. 50, 8 South. 121; *State v. Williams*, 14 Tex. 98; *United States v. Mann*, 95 U. S. 580, 24 L. Ed. 531.

In *Nassitts v. State*, 36 Tex. App. 5, 34 S. W. 957, the court said: "The indictment charging embezzlement is fatally defective which fails to allege agreement to carry, and by whom the defendant was intrusted with the property, and what disposition he was to make of same."

No intendment can aid a charge where the facts and circumstances alleged do not bring the accused within the prohibition of the law. *State v. Hall*, 72 Iowa, 525, 34 N. W. 315;

People v. Olmsted, 74 Hun, 323, 26 N. Y. Supp. 818; *Pettibone v. United States*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419.

The object for which the money embezzled was originally received by the accused should be set out in the indictment. It was so held in *Territory v. Maxwell*, 2 N. Mex. 250.

No individual section of our statutes on embezzlement prescribes the complete offense; said sections, in so far as they apply to the offense, must therefore be taken collectively.

All indictments upon statutes must state all the circumstances which constitute the definition of the offense of the act, so as to bring the defendant precisely within it. They must pursue the precise technical description of the act itself. It is necessary that the defendant be brought within all the material words of the statute, and nothing can be taken by intendment. *People v. Clark*, 10 Mich. 310; *People v. Richards*, 1 Mich. 217, 51 Am. Dec. 75, Wharton on Criminal Law, 132; *People v. Taylor*, 96 Mich. 576, 56 N. W. 27, 21 L. R. A. 287.

Allegation of a demand upon defendant, or a concise narration of positive circumstances showing the same to be unnecessary or impossible, is absolutely imperative as a condition precedent to criminal prosecution for embezzlement under the Arizona statutes prescribing the offense.

Demand must be made. *State v. Pierce*, 7 Kan. App. 418, 53 Pac. 278; *People v. Page*, 116 Cal. 386, 48 Pac. 326.

Intent to defraud must be alleged. *McKnight v. United States*, 111 Fed. 735; *United States v. Carll*, 105 U. S. 611, 26 L. Ed. 1135; *United States v. Brazeau*, 78 Fed. 465.

"In every crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence." *Eilers v. State*, 34 Tex. App. 344, 30 S. W. 811.

Felonious intent is an essential ingredient of embezzlement. *State v. Marco*, 32 Or. 175, 50 Pac. 799; *People v. Galland*, 55 Mich. 628, 22 N. W. 81; *People v. Hurst*, 62 Mich. 276, 28 N. W. 838; *State v. Reilly*, 4 Mo. App. 392; *Walker v. State*, 117 Ala. 42, 23 South. 149.

E. W. Wells, Attorney-General, for Respondent.

As a general rule, it is sufficient if an indictment or information charges an offense in the language of the statute;

and even the statutory words need not be strictly pursued, but others conveying the same meaning may be used. *State v. McGaffin*, 36 Kan. 315, 13 Pac. 560; *People v. Potter*, 35 Cal. 110.

Embezzlement is an offense created by statute, and the overwhelming weight of authority is that it is sufficient to charge the crime in the language of the statute. *State v. Turner*, 10 Wash. 94, 38 Pac. 864; *People v. Tomlinson*, 66 Cal. 344, 5 Pac. 509.

The further contention of appellant that the indictment must set forth the purpose for which the property was intrusted to the defendant, and the terms of the trust, is not sustained by the weight of authority. That it is not necessary to do so is in accord with the modern authorities. *People v. Hill*, 3 Utah, 344, 3 Pac. 75; *State v. Turner*, 10 Wash. 94, 38 Pac. 864; *State v. Whiteman*, 9 Wash. 402, 37 Pac. 659; *Commonwealth v. Bennett*, 118 Mass. 443.

Where a demand is not made an ingredient of the crime itself, it is not necessary to allege a demand in the indictment. *Wallis v. State*, 54 Ark. 611, 16 S. W. 821; *State v. Flournoy*, 46 La. Ann. 1518, 16 South. 454; *Edelhoff v. State*, 5 Wyo. 19, 36 Pac. 627; *Hollingsworth v. State*, 111 Ind. 289, 12 N. E. 490.

Nor is it necessary to specifically allege the fraudulent intent in the indictment. Such an intent is sufficiently charged in the allegation that the defendant fraudulently appropriated the property to his own use and to a use and purpose not in the due and lawful execution of his trust. *State v. Trolson*, 21 Nev. 419, 32 Pac. 930; *State v. Combs*, 47 Kan. 136, 27 Pac. 818; *State v. Noland*, 111 Mo. 473, 19 S. W. 715.

DAVIS, J.—The indictment under which the defendant was convicted charged: "That the said Justin T. Hinds, at the county of Yavapai and territory of Arizona, on or about the 22d day of September, 1902, then and there being and acting as the manager of the Prescott Realty Company, a corporation, and as such manager, and by virtue of his said employment, being then and there intrusted by the State of Arizona Mines Corporation, a corporation, with a certain check, and receiving and having said check in his possession by virtue of his said trust, to wit, a check for the sum of

seven hundred and thirty-one dollars and sixty cents, of the value of seven hundred and thirty-one dollars and sixty cents, in lawful money of the United States; said check being then and there the property of the said State of Arizona Mines Corporation, and received by the said Justin T. Hinds, as aforesaid, in the name and on account of the said State of Arizona Mines Corporation; and the said defendant, Justin T. Hinds, having thereafter, on the said 22d day of September, 1902, cashed the said check at the Bank of Arizona, in Prescott, Arizona, and received the proceeds thereof, to wit, the sum of seven hundred and thirty-one dollars and sixty cents, into his own possession and upon his own account, did then and there unlawfully, feloniously, and fraudulently embezzle and convert to his own use, and not to any use or purpose in the due and lawful execution of his said trust, all of the proceeds of said check, to wit, the sum of seven hundred and thirty-one dollars and sixty cents, contrary to the form, force, and effect of the statute," etc. There was a demurrer to the indictment, and the overruling of the demurrer is assigned as error. It is insisted that the indictment is not "direct and certain," either as regards "the offense charged," or "the particular circumstances . . . necessary to constitute a complete offense," and also "that the facts stated do not constitute a public offense." It is conceded that the prosecution in this case is based upon section 458 of the Penal Code, and the jury was so instructed by the court. The section referred to reads as follows: "Every officer of this territory, or of any county, city or other municipal corporation or subdivision thereof, and every deputy clerk, or servant of any such officer, and every officer, director, trustee, clerk, servant or agent of any association, society or corporation (public or private) who fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust, any property which he has in his possession, or under his control by virtue of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement." The next following four sections define how and under what circumstances embezzlement may also be committed by persons occupying various other relations of trust and confidence, such as carrier, trustee, banker, merchant, broker, attorney, agent, assignee in trust, executor, adminis-

trator, collector, bailee, tenant, lodger, clerk, and servant. Our present purpose, however, requires only the consideration of section 458, and a determination as to whether or not the indictment sufficiently describes an offense thereunder. "This section," it has been said by this court, "was meant to apply to persons occupying fiduciary relations, such as public officers, and officers and agents of corporations, public and private. To sustain a conviction under this section, three facts must be shown: (1) The trust relation; (2) the possession or control of property by virtue of the trust; and (3) the fraudulent appropriation of the property, not in the due and lawful execution of the trust." *Territory v. Meyer*, 3 Ariz. 199, 24 Pac. 183. Embezzlement was not an offense at common law, but was created by statute to meet a defect in the law of larceny, which required a trespass. Mr. Bishop calls it "a sort of statutory larceny committed by servants and other like persons where there is a trust reposed, and therefore no trespass, so that the act would not be larceny at the common law." 1 Bishop on Criminal Law, sec. 567. Being statutory, it is always within the power of the legislature to declare what acts shall constitute the crime. The trust relation referred to in section 458, as it applies to the case before us, is that which exists between the agent and the corporation. The property which, in the contemplation of that section, may become the subject of embezzlement, is primarily the property of the corporation—property which, having come into his possession or control by virtue of said trust relation, the agent can be required to account for to the corporation. It must be property in which the corporation has at least some qualified ownership. The statute under consideration is one which "fully, directly and expressly, without any uncertainty or ambiguity, sets forth all the elements necessary to constitute the offense," and the pleader could have safely and sufficiently charged the crime in the language of the statute. *People v. Mahlman*, 82 Cal. 585, 23 Pac. 145; *People v. Ward*, 134 Cal. 301, 66 Pac. 372; *People v. Cobler*, 108 Cal. 538, 41 Pac. 401; *United States v. Carll*, 105 U. S. 611, 26 L. Ed. 1135. He could also have used other words conveying the same meaning. Pen. Code, sec. 832. But there is a noticeable departure from the phraseology of the statute in the indictment which is before us. In effect, it charges that the

defendant, while acting as the manager of the Prescott Realty Company, a corporation, was intrusted by the State of Arizona Mines Corporation with a certain check, the proceeds of which he embezzled. It is averred that the check was intrusted to the defendant by virtue of his said employment, but it is not alleged what, if any, interest the Prescott Realty Company had in the check, nor that the defendant received it for or on account of his principal. On the contrary, there is the express averment that the check was the property of the said State of Arizona Mines Corporation, and was received by the defendant in the name and on account of said last-mentioned corporation. For whom then was the defendant acting in a fiduciary capacity, according to these allegations? To which corporation was he accountable for the conversion of the property? Or, applying a test plainly warranted by the statute, to whose demand for the return of the property would the defendant comply in order to avoid criminal liability? If the answer must be read in the averments of the indictment, we should not be able to say it was the Prescott Realty Company. The trust relation under which the property was misappropriated, being an essential element of the crime, was required to be clearly and distinctly set forth. It is not so alleged here, and, because the indictment is not "direct and certain" in this regard, it does not conform to the requirements of the code. The judgment will accordingly be reversed, with directions that the district court sustain the demurrer to the indictment.

Doan, J., concurs.

KENT, C. J.—I do not concur in the opinion of the court in this case.

[Civil No. 846. Filed March 26, 1904.]

[76 Pac. 470.]

JAKE MARKS, and B. M. CRAWFORD, Defendants and Appellants, v. THE BRADSHAW MOUNTAIN RAILROAD COMPANY, a Corporation, Plaintiff and Appellee.

1. **CONDEMNATION PROCEEDINGS—EVIDENCE—DAMAGES—HARMLESS ERROR.**—The exclusion of the opinion of defendant's witness as to the value of the mine in a condemnation proceeding, if error, is harmless where two other of defendant's witnesses have clearly testified that the value was as alleged in the answer, and no issue is raised as to such value.
2. **SAME—SAME—BENEFITS—HARMLESS ERROR.**—The admission of evidence in condemnation proceedings, that defendant's property had been benefited, if error, is harmless, the finding of the jury being that there were neither damages nor benefits.
3. **SAME—FINDINGS—VALUE—PROPERTY ACTUALLY TAKEN—WAIVER.**—Although the owner of land sought to be condemned for a right of way is entitled to the full value of the land actually taken, a finding that such land had no value is warranted where defendant, upon the trial before the jury, expressly waives the right to recover for the strip taken.
4. **SAME—INJURIES TO LAND NOT TAKEN—FINDINGS—SUPPORTED BY EVIDENCE—WILL NOT BE DISTURBED.**—While in condemnation proceedings the owner is entitled to compensation for injuries resulting from the construction of a railroad to the portion of the land not taken, the verdict of the jury that no injury had been suffered will not be disturbed where there is substantial evidence to support it.
5. **SAME—CONSTITUTIONAL LAW—APPEAL AND ERROR—NEW QUESTION ON APPEAL.**—A question as to the constitutionality of a statute allowing plaintiff in condemnation proceedings to enter before decree, and fixing the damages therefor at ten per cent of the award, cannot be raised by the defendant for the first time on appeal, it only affecting that portion of the act relating to possession before final decree, and having no effect upon the subsequent proceedings, and being entirely immaterial where no verdict for damages was returned.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Yavapai. R. E. Sloan, Judge. Affirmed.

The facts are stated in the opinion.

J. F. Wilson, and Hawkins, Ross & Anderson, for Appellants.

The market value of property sought to be taken under eminent domain proceedings is not the sole or exclusive measure of damages to be awarded to the owner, and, under the circumstances shown in this case, a witness having the knowledge shown to have been possessed by Mr. Marks is competent to testify to the value of the property in dispute, although he has no knowledge of sales of similar property in the neighborhood. *St. Louis etc. R. R. Co. v. Chapman*, 38 Kan. 307, 5 Am. St. Rep. 744, 16 Pac. 695; *Le Roy etc. Ry. Co. v. Hawk*, 39 Kan. 638, 7 Am. St. Rep. 566, 18 Pac. 943; *San Diego Land etc. Co. v. Neale*, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 89, 88 Cal. 50, 25 Pac. 977, 11 L. R. A. 604; *Montana Ry. Co. v. Warren*, 137 U. S. 348, 11 Sup. Ct. Rep. 96, 34 L. Ed. 681.

In arriving at the amount of compensation payable to appellants on account of the taking of their property, it is not permissible under our statute or under the federal constitution to offset against the actual damages or deprivation proven general benefits which may have accrued to the property in question, in common with other property of the same character situated in the Bradshaw Mountains by reason of the building of the appellee's railroad. *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 13 Sup. Ct. Rep. 622, 37 L. Ed. 463; *Bauman v. Ross*, 167 U. S. 548, 17 Sup. Ct. Rep. 966, 42 L. Ed. 270; *McReynolds v. Burlington etc. Ry. Co.*, 106 Ill. 152; *Tobie v. Brown County Commrs.*, 20 Kan. 14; *Harris v. Schuylkill etc. R. R. Co.*, 141 Pa. St. 242, 23 Am. St. Rep. 278, 21 Atl. 590; *Combs v. Smith*, 78 Mo. 32; *Meachem v. Fitchburg Ry. Co.*, 4 Cush. 298; *Natchez etc. R. R. Co. v. Currie*, 62 Miss. 506; *Chicago etc. R. R. Co. v. Blake*, 116 Ill. 163, 4 N. E. 488; *Milwaukee etc. R. R. Co. v. Eble*, 3 Pinn. 334; *St. Louis etc. Ry. Co. v. Fowler*, 113 Mo. 458, 20 S. W. 1069; *City of Paris v. Mason*, 37 Tex. 447; *Washington Ice Co. v. City of Chicago*, 147 Ill. 327, 37 Am. St. Rep. 222, 35 N. E. 378; *Little Rock etc. Ry. Co. v. Allister*, 68 Ark. 600, 60 S. W. 953.

Thus, the fact that the railroad building upon one's land is a trunk line does not constitute a special benefit. *Laflin v. Chicago etc. R. R. Co.*, 33 Fed. 415; *Mangles v. Freeholders*, 55 N. J. L. 88, 25 Atl. 222, 17 L. R. A. 785; *Pittsburgh etc.*

Ry. Co. v. McCloskey, 110 Pa. St. 436, 1 Atl. 555; *Commissioners v. O'Sullivan*, 17 Kan. 58.

Appellants are entitled to recover from appellee the full value of the land actually taken, and for all injuries appreciably resulting from the construction of the railroad to that part of the mining claims not taken by appellee. *Chicago etc. Ry. Co. v. Wolf*, 137 Ill. 360, 27 N. E. 78; *Chicago etc. Ry. Co. v. McGrew*, 104 Mo. 282, 15 S. W. 931; *Orange Belt R. R. Co. v. Craver*, 32 Fla. 28, 13 South. 444.

T. J. Norton, for Appellee.

KENT, C. J.—The appellee, the Bradshaw Mountain Railroad Company, in constructing its railroad, found it necessary to cross a certain mining claim known as the "Contention" claim, belonging to the appellants. The company instituted condemnation proceedings for a right of way over the ground, as provided by our statutes, executed the necessary bond, took possession under an order of the court, and built its railroad across the claim. The defendants, the appellants in this court, made answer, alleging damage by reason of the taking of the right of way, in that the railroad passed in the direction of the vein of the claim, and prevented the free use and operation of the mine. They alleged the value of the claim to be twenty-five thousand dollars, and the damage resulting from the interference with the free use and operation of the mine to be the sum of six thousand dollars. The plaintiff, in reply, denied that the railroad traversed the vein as specified; alleged that no damage had resulted, or would result, to the defendants by reason of the crossing of the railroad over the premises, or that the free use and operation of the mine was thereby obstructed; and alleged that the construction of the railroad was a benefit to the defendants, rather than an injury. The case was tried on the issues thus raised, the allegations of the complaint as to damage to another mining claim of the defendants, known as the "Lucky Cuss," not being pressed upon the trial or involved in this appeal.

Evidence was introduced at the trial on the part of the defendants to show the value of the mining claim as a whole, and to show that the location of the railroad and the right of way sought to be condemned prevented the free operation

of the mine, particularly with regard to the construction of shafts and hoists upon the property, and caused loss and damage to the defendants. No evidence was given as to the value of the strip itself taken by the railroad company. The plaintiff introduced evidence to show that the location of the railroad across the property did not interfere with the free use and operation of the mine, and that the defendants had suffered no damage thereby; and also evidence to show that general and special benefits had resulted to the defendants by reason of the construction of the railroad. The jury were instructed to return specific answers to the questions required by our statutes in condemnation proceedings, and they returned a verdict in the form required. In this verdict they found the ownership of the claim in the defendants; they found the surface value of the right of way "to be the sum of \$00"; they assessed the damages accruing to the claim not included in the right of way, by reason of its severance from the portion taken for the right of way and used in the construction of the railroad, "to be the sum of \$00"; and they found that the portion of the claim not taken by the railroad was benefited by the construction of the railroad "in the sum of \$00." On this verdict judgment was entered decreeing the plaintiff its right of way across the property, with costs to the defendants.

1. The appellants assign as error the ruling of the trial court in excluding the testimony of one of the owners of the property, the defendant Marks, as to the value of the whole property as a mine. The evidence was excluded, because the witness was unable to testify as to the market value of the property, his knowledge of the value being based upon his knowledge of this mine and the values of similar mines in other localities. We doubt whether the witness brought himself within the rule, as to the competency of such testimony, laid down in the case of *Montana Railway Co. v. Warren*, 137 U. S. 348, 11 Sup. Ct. 96, 34 L. Ed. 681, as claimed by appellants; but the exclusion of his testimony by the court, if such ruling was error, was not such action as calls for a reversal of the judgment. The appellants were in no way harmed thereby. The testimony sought to be introduced was the opinion of the witness as to the value of the whole property as a mine. It was not an inquiry as to the surface value

of the strip taken, or the value of such right of way, but was an inquiry as to the value of the whole property as a mine, and was material, if at all, only as it had a bearing upon the damage, if any, to the operation of the mine by the construction of the railroad across the vein and claim. The defendants introduced two other witnesses to prove such value of the property as a mine, who testified directly and clearly that the value was substantially that alleged in the answer. No evidence was offered by the plaintiff to contradict such testimony as to the value of the property. The evidence of the witness Marks, if admitted, would have been cumulative merely; and as no issue was raised as to such value, or as to the truth of the testimony on the part of the defendants in this regard, the appellants were not injured by the exclusion of the testimony of Marks upon this point.

2. The defendants next assign as error the introduction of testimony, on the part of the plaintiff, showing the general benefits accruing to this and other property in the locality, and the general increase in market value of such properties, by the construction of the railroad; and also the instruction of the court that the jury might consider whether there had been such general benefits or general increase, in assessing the benefit, if any, accruing to the mine by reason of the construction of the railroad. We do not deem it necessary to determine whether the testimony introduced with respect to the benefits that had accrued, and referred to by counsel, was testimony of general benefits, or whether it was testimony of direct and special benefits accruing to the individual piece of property in question, or whether error was committed in the introduction of such testimony, or in the charge of the court; for, so far as the present case is concerned, the admission of the evidence on this point, and the instructions to the jury in regard thereto, afford no grounds for a reversal of the judgment. The jury found that no damages had been suffered, hence there could be no set-off for benefits; and, furthermore, the jury specifically found that no benefits whatever accrued to the mine by reason of the construction of the railroad. The defendants, therefore, were in no way injured by the admission of the evidence or the instructions of the court.

3. It is next urged "that appellants are entitled to recover from the appellee the full value of the land actually taken, and for all injuries appreciably resulting from the construction of the railroad to that part of the mining claims not taken by the appellee." This contention states two correct legal propositions:

It is quite clear that the owner of land sought to be condemned for a right of way is entitled to the full value of the land actually taken. In the case at bar the jury found that the land actually taken had no value at all. We have some doubt whether a verdict which did not even award nominal damages for land taken, but which found that such land, as land, had no value at all, could ordinarily be upheld, where there was any evidence at all given as to such value. We think, as a rule generally applicable to such cases, the jury should find the land of some value, if only of a nominal value. This rule, however, can have no application here, for this question and the right to recover for the value of the strip taken by the railroad was expressly waived by the defendants upon the trial, and in the presence of the jury. The jury were therefore at liberty to render a verdict that the land was worthless under such waiver by the defendants of any claim of damage therefor. This waiver on the part of the defendants for any claim for the value of the right of way is repeated in the following statement in the appellants' reply brief, to wit: "It is admitted that the sole element of damage claimed by appellants is the inconvenience, obstruction, and extra expense to which they are put in the development and operation of the Contention mining claim by the construction of appellee's railroad upon and across said claim." There was therefore no error in the finding of the jury as to the value, or want of value, in the land actually taken.

It is also quite clear that the owner is entitled to compensation for the injuries resulting from the construction of the railroad to the portion of the land not taken by the railroad. The jury found that no such injury had been suffered. But this was a clear issue of fact submitted to them upon conflicting testimony as to whether or not such injury had been suffered. There being substantial evidence to support their verdict in this regard, we are not at liberty to disturb it.

The contention of the defendants as to these two questions, therefore, while correctly stating the law in regard to damages in condemnation proceedings, under the facts in this case affords no ground for a reversal of the judgment.

4. It is further urged that the statute allowing the plaintiff in condemnation proceedings to be let into the use of the property before condemnation is decreed is unconstitutional, as permitting private property to be taken for public use without just compensation, in that the legislature has assumed arbitrarily to determine that ten per cent interest upon the compensation awarded, from the date at which possession is taken, shall be adequate compensation for the use and occupation pending the condemnation proceedings. This question was not raised in the court below, and we do not think it necessary to determine it here. If the contention of the appellants be correct, it would invalidate only that portion of the act relating to possession prior to the final decree which is objected to. It would have no effect here upon the legality of the subsequent proceedings, or the judgment rendered herein. In this case, inasmuch as the jury found that the defendants suffered no damage at all in the premises, it is of no consequence to the defendants whether or not the law provides for the full measure of damages when such have been sustained.

Upon the facts of the case we think that no error was committed that calls for a reversal of the judgment, and that the verdict should stand. The judgment of the court below is therefore affirmed.

Doan, J., and Davis, J., concur.

[Criminal No. 176. Filed March 26, 1904.]

[76 Pac. 472.]

**SANTIAGO BERREYESA, Defendant and Appellant, v.
TERRITORY OF ARIZONA, Plaintiff and Respondent.**

1. **CRIMINAL LAW — OBTAINING MONEY BY FALSE PRETENSES — WHAT CONSTITUTES.**—Where an interpreter knowing of a custom of a county board of supervisors to pay fees for acting as interpreter in criminal cases before justices of the peace, knowingly and
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designedly obtained from the county compensation by means of false pretenses that he had rendered such service, he is guilty of obtaining money under false pretenses, and absence of statutory authority for the payment of such compensation constitutes no defense.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Edward Kent, Judge. Affirmed.

The facts are stated in the opinion.

Street & Alexander, for Appellant.

It is a well-settled rule that neither the state nor any county is liable for fees in any criminal prosecution in the absence of an express statute on the subject. *Commissioners v. Watson*, 7 Okla. 174, 54 Pac. 441; *Rawley v. Board*, 2 Blackf. (Ind.) 355; *Heller v. Board*, 23 Kan. 128; *State v. Campbell*, 19 Kan. 481; *Commissioners of Larimer County v. Lee*, 3 Colo. App. 177, 32 Pac. 841; *Williams v. Northumberland County*, 110 Pa. St. 48, 20 Atl. 405; *Commissioners v. Wilson*, 3 Colo. App. 492, 34 Pac. 265; *Hutt v. Board of Supervisors*, 19 Wis. 128; *State v. Commissioners of Pamlico County*, 120 N. C. 19, 26 S. E. 649; *Guilford v. Commissioners of Beaufort County*, 120 N. C. 23, 27 S. E. 94.

It is also a well-established rule that before the claim of false pretenses can be brought within the statute that the act in obtaining the property must be to some extent calculated to deceive; that it must not be plainly absurd, or irrational, and that the party defrauded must not be guilty of gross carelessness. The indictment shows on its face that the board of supervisors were grossly careless and negligent in allowing and ordering paid the claim of appellant for interpreter's fees, for the reason that a claim for interpreter's services against a county is not made a just or lawful demand by statute. Therefore, if a claim for interpreter's services is not a lawful claim, the allowance of the same imputes gross carelessness and negligence upon the board of supervisors, and they were not deceived by the defendant in presenting his claim to them for allowance for such service, for they ought to have known that the same was not a proper charge against the county, and not allowable, and should have rejected it.

In order to bring the offense of false pretenses within the statute it is essential that the false pretense must have been the influence which induced the payment of the money, and the statute should not be interpreted so as to include cases where the party defrauded had the means of detection at hand. *People v. Oyer and Terminer Court*, 83 N. Y. 449, 450; *Commonwealth v. Drew*, 19 Pick. 179; *State v. De Hart*, 6 Baxt. 222; *Burrows v. State*, 12 Ark. 65; *State v. Burnett*, 119 Ind. 392, 21 N. E. 972; *State v. Estes*, 46 Me. 150; *State v. Young*, 76 N. C. 258; *Commonwealth v. Grady*, 13 Bush, 285, 26 Am. Rep. 192; *People v. Williams*, 4 Hill, 9, 40 Am. Dec. 258; *People v. McAllister*, 49 Mich. 12, 12 N. W. 891.

E. W. Wells, Attorney-General, for Respondent.

DAVIS, J.—The appellant was convicted of the crime of obtaining money under false pretenses, alleged to have been committed in presenting to the board of supervisors of Maricopa County, and obtaining the allowance and payment of, a fraudulent demand on said county for per diem services as interpreter, which services he falsely pretended had been rendered by him at the trial of certain criminal cases before a justice of the peace in that county. The indictment was demurred to on the ground that the facts stated did not constitute a public offense, and the overruling of the demurrer is assigned as error.

It is contended on the part of the appellant that at the time of the alleged offense (January 31, 1903) there was no provision of law authorizing the payment by the county of compensation to interpreters for services in criminal cases, and that as such a claim could not, under any circumstances, become a legal charge against the county, the allowance and payment thereof could not, in contemplation of law, be induced by any false pretense made in relation to it. We consider this view to be fallacious. Carried to its logical sequence, it would permit the wrong-doer to construct a shield out of the very ignorance upon which his criminal artifice had successfully played. The demurrer does not necessarily involve the question of whether a claim for interpreter's fees was, under the existing statutes, a lawful charge against the county. In pleading the particular circumstances of the offense, the

indictment sets forth that it was the rule and the custom of the county to pay interpreters an established rate per diem for services in criminal cases before justices of the peace, and that this was well known to the defendant. The averments thus disclose that the county, by its proper officers and agents, was proceeding upon the theory that the law authorized the payment of claims of this character. If the defendant, with a knowledge of the prevailing custom as to the allowance and payment of such claims, and using the routine required therefor, knowingly and designedly obtained from the county compensation for services which he had never rendered, and he accomplished this end by means of the false representation and pretense that such services had in fact been performed by him, an offense was committed, irrespective of whether the county was acting under a mistaken theory of the law. The strict responsibility to which the supervisors are held in *Avery v. Pima County*, 7 Ariz. 26, 60 Pac. 702, for a disbursement of county funds without authority of law, can in no way have an effect to lessen the guilt of the beneficiary who has procured the unlawful payment by criminal means. The civil liability on the one hand may exist contemporaneously with the criminal liability on the other.

It was for the jury to say whether the false pretense alleged in the indictment was not the direct, moving cause which induced the county to part with its money. This is the only matter discussed by counsel in their briefs, and an examination of the record discloses no error which would warrant us in disturbing the judgment. It will accordingly be affirmed.

Sloan, J., and Doan, J., concur.

[Civil No. 819. Filed March 26, 1904.]

[76 Pac. 473.]

SIX PARCELS OF PLACER GOLD, Defendant and Appellant, v. UNITED STATES OF AMERICA, Plaintiff and Appellee. JOSE SAN VICENTE, Claimant.

1. **REVENUE LAWS—MERCHANDISE DEFINED—PLACER GOLD—REV. STATS. U. S., SEC. 2766 (U. S. COMP. STATS. 1901, p. 1861), CONSTRUED.**—The definition of the word "merchandise" given in the statute, *supra*,—"The word merchandise, as used in this title, may include goods, wares, and chattels of every description capable of being imported,"—is sufficiently broad to include placer gold.
2. **SAME—FORFEITURE OF GOODS—PETITION—SUFFICIENCY—REV. STATS. U. S., SEC. 2851 ET SEQ. (U. S. COMP. STATS. 1901, p. 1901), AND 1 SUPP. REV. STATS. U. S., p. 745 ET SEQ., CITED.**—Under the statutes, *supra*, providing that all merchandise imported into the country must be invoiced, which invoice shall be produced to the consul, and requiring that a declaration shall be filed with the collector of the port at the time of entry, an information for the forfeiture of goods imported into the country without authority of law, alleging that goods were imported without being invoiced or entered with any collector of customs, and without declaration to the proper revenue officer, and that some person fraudulently brought into the country from a foreign country goods which should have been invoiced, declared, and entered according to the law, with intent to defraud the government, is sufficient.
3. **SAME—NON-DUTIABLE GOODS—MUST BE INVOICED—REV. STATS. U. S., PAR. 2851, CONSTRUED.**—The statute, *supra*, providing a fee of two dollars and fifty cents "for every verification of an invoice and certificate before a consul or commercial agent," applies to non-dutiable as well as to dutiable goods.
4. **SAME—IMPORTATION OF NON-DUTIABLE GOODS WITHOUT INVOICING AND PAYMENT OF FEES—FRAUDULENT—REV. STATS. U. S., SEC. 2851 (U. S. COMP. STATS. 1901, p. 1901), CITED.**—Under the statute, *supra*, providing that consuls shall be entitled to a fee of two dollars and fifty cents for every verification of an invoice and certificate, the fee belongs to the United States, and the importation of non-dutiable goods without being invoiced or entered, and without declaration being made, is an act injurious to the government and fraudulent.
5. **SAME—SAME—LIABILITY—FORFEITURE—FRAUDULENT INTENT—IMMATERIAL—ACT CONGRESS JUNE 22, 1874, c. 391, PAR. 16, 18 STATS. 189, AND ACT CONGRESS JUNE 10, 1890, c. 407, SEC. 29, 26 STATS. 141 (U. S. COMP. STATS. 1901, p. 1897), CONSTRUED.**—The act of

June 10, 1890, *supra*, having repealed the act of June 22, 1874, *supra*, which provided that in all actions to declare the forfeiture of merchandise by reason of a violation of the revenue laws, the court should submit the question whether the acts were done with intent to defraud the government, to the jury the intent of the person violating the revenue laws is immaterial.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. George R. Davis, Judge. Affirmed.

The facts are stated in the opinion.

Barnes & Martin, for Appellant.

"A court will not impose a forfeiture by implication, and an importer who enters goods free that are dutiable is liable, but the goods are not forfeitable." *An Ullage Box of Sugar*, 1 Ware (350) 355, Fed. Cas. No. 14324; *Cargo of Lady Essex*, 39 Fed. 765; *United States v. Coquitlam*, 57 Fed. 706; *United States v. Four Packages*, 97 U. S. 404, 24 L. Ed. 1031.

A forfeiture is imposed only for fraud or misconduct. *Bank of United States v. Deveaux*, Fed. Cas. No. 916.

The act of June 22, 1874, (secs. 16, 18, U. S. Stats. at Large, p. 189,) makes the finding of an intent to defraud a prerequisite for the forfeiture of goods. *United States v. Ninety Demijohns Aguadiente*, Fed. Cas. No. 15887.

The court holds in *United States v. Three Trunks*, 8 Fed. 485, 7 Saw. 364, that the question of fraud is a question to submit to the jury, and in this case the court refused to submit that question to the jury, holding that if the goods were imported without a consular invoice, the jury must find for the plaintiff, without any regard to the question of fraud or intent, or whether there was in fact any fraud committed. See, also, *Friedenstein v. United States*, 125 U. S. 224, 8 Sup. Ct. 838, 31 L. Ed. 736.

Under section 16 of the act of 1874, it was held that the government must show affirmatively an act or intent to defraud. *United States v. Three Trunks*, 8 Fed. 583, 7 Saw. 364; *The Purissima Concepcion*, 24 Fed. 358.

In proceedings for the forfeiture of smuggled goods, it must be shown that such goods were actually smuggled before the government will be entitled to a forfeiture, and the question

of an intent to defraud is for the jury. *Origet v. United States*, 125 U. S. 240, 8 Sup. Ct. 846, 31 L. Ed. 743; *Friedenstein v. United States*, 125 U. S. 224, 8 Sup. Ct. 838, 31 L. Ed. 736; *United States v. A Lot of Jewelry*, 59 Fed. 684; *United States v. One Oil Painting*, 31 Fed. 881.

Frederick S. Nave, United States Attorney, and John H. Campbell, Assistant United States Attorney, for Appellee.

The definition by statute of merchandise is so broad as to include placer gold. Rev. Stats. U. S. 2766.

Merchandise cannot be lawfully imported into the United States, (1) without invoicing the same and obtaining the certificate of some consul, vice-consul, or commercial agent of the United States to such invoice, and (2) without entering the same by formal declaration at a port of entry of United States at the office of the collector of customs, and (3) without the production there of said certified invoice as aforesaid, or, in certain circumstances, the giving of bond for the production of such invoice. Act June 10, 1890, 1 Supp. Rev. Stats. U. S. 745; *United States v. Mosby*, 133 U. S. 273, 10 Sup. Ct. 327, 33 L. Ed. 625.

The foregoing prohibition applies in full force to the importation of non-dutiable merchandise. *United States v. Mosby*, *supra*; *Phelps v. Siegfried*, 142 U. S. 602, 12 Sup. Ct. 391, 35 L. Ed. 1128.

The fees collected by consular officers for certifying invoices of merchandise about to be imported into the United States are part of the revenue of the United States. Rev. Stats. U. S., sec. 2851; *United States v. Mosby*, *supra*.

That the actual intent of the importer of merchandise shall be to defraud the revenue of the United States is not an element of an unlawful importation. Rev. Stats. U. S., sec. 3082; *Friedenstein v. United States*, 125 U. S. 224, 8 Sup. Ct. 845, 31 L. Ed. 736; *United States v. A Lot of Jewelry*, 59 Fed. 684.

Whether or not there was an intention to defraud the revenue of the United States, merchandise unlawfully imported into the United States is forfeitable. *United States v. A Lot of Jewelry*, *supra*; *Friedenstein v. United States*, *supra*; *Von Cotzhausen v. Nazro*, 107 U. S. 215, 2 Sup. Ct.

503, 27 L. Ed. 540; *Lewey v. United States*, 15 Blatchf. 1, Fed. Cas. No. 8309.

DOAN, J.—In this case a customs officer of the government found the claimant, after his arrival within the United States, having in his possession six parcels of placer gold. This gold the officer seized and delivered to the collector of customs of the United States for the district of Arizona, at Nogales, who held the same in his custody as forfeited to the United States. The claimant demanded the gold, as the owner thereof, from the collector of customs, which demand was refused. Thereupon the government commenced proceedings by information to have the said gold forfeited on the ground that it had been imported from Mexico contrary to law, and that it was liable to seizure and forfeiture. The claimant filed a demurrer and answer to the information, and alleged that he was the owner of the said six parcels of gold, and made claim to the same. After a general demurrer the claimant demurred specially to the information upon the ground "that said information does not state facts sufficient to authorize the court to grant the relief prayed for, because, (1) said petition does not state that the United States was in any manner injured or defrauded out of any revenue or customs duties; (2) for the reason that said six parcels of placer gold were not dutiable goods, and parties have the right to import the same without the payment of any duties whatsoever, and the United States is not injured or defrauded by the failure to declare the same, as alleged." The demurrers were overruled by the court, to which ruling the claimant excepted, and the cause proceeded to trial before a jury upon the answer of the claimant, in which he denied any intention to defraud the government of the United States in any way or at all, and alleged that the said goods were seized and taken from him in the territory of Arizona, in the United States, and that the same were at the time of the seizure aforesaid lawfully in his possession, and denied that the said goods, or any part thereof, were ever imported from a foreign country into the United States. After hearing the evidence on the issues of fact raised in the answer, and receiving the instructions of the court, the jury returned a verdict in favor of the government, whereupon the court rendered judgment declar-

ing the gold forfeited to the United States of America, and ordering its disposal in accordance with the revenue and customs laws of the United States in such cases made and provided. To the instructions as given by the court, counsel for claimant then and there excepted; and to the refusal of the court to give the instructions requested by claimant, said counsel also excepted. From the judgment of the court and the denial of the motion for a new trial, the claimant appealed.

The claimant does not appear to rely upon the general demurrer or his denial of the importation of the goods, but contends that, the goods not being dutiable, the government was not defrauded of its revenue, and for that reason the goods cannot be forfeited to the government under our revenue laws. There are some twenty-six assignments of error, based upon the overruling of the demurrers, the admission of evidence, the several instructions given either in the charge of the court or on motion of the government, the refusal of the several different instructions requested by the claimant, and the denial of the motion for a new trial. These are all, however, directed to the liability to forfeiture of non-dutiable goods, and the case, as a whole, presents fairly, fully, and only the one question whether non-dutiable goods can be forfeited for entry in violation of the statutes providing for their importation. To this the counsel have addressed themselves in their brief, and this we consider the controlling legal issue in the case.

The first assignment of error presents this question, the decision of which determines the entire case of the appellant. It reads: "The court erred in overruling the demurrer to the libel for the reason that the petition does not state facts sufficient to constitute a cause of action. It does not state that the United States was in any manner injured or defrauded out of any revenue or customs duties. The six parcels of placer gold were not dutiable goods. Parties have a right to import gold without the payment of duties, and the government is not injured or defrauded by the failure to declare the same as alleged." The allegations of the information attacked by this demurrer alleged that the goods seized were "fraudulently and clandestinely imported and brought into the said United States from the republic of Mexico . . . contrary to law; that is to say, without the

same being invoiced or entry thereof being made with any collector of customs of the said United States, and without declaration thereof being made to any proper revenue officer of the said United States—contrary to the statute in such cases made and provided. And for that some person . . . before the time of said seizure . . . did fraudulently and knowingly import and clandestinely bring into the said United States from the republic of Mexico the said placer gold, the same being then and there goods and merchandise which should have been invoiced, declared, and entered according to law, and without invoice, declaration, or entry of the same, and with the intent to defraud the said United States, contrary to the form of the statute in such cases made and provided. Wherefore, by reason of the premises, and by force of the statute aforesaid, it became and is forfeited to the said United States.” The statute under which the proceeding was had provides: “Sec. 3082 [Rev. Stats. U. S. (U. S. Comp. Stats. 1901, p. 2014)]. If any person shall fraudulently or knowingly import or bring into the United States . . . any merchandise, contrary to law, . . . such merchandise shall be forfeited . . .” The definition of the word “merchandise” given in section 2766 of the Revised Statutes of the United States [U. S. Comp. Stats. 1901, p. 1861]—“The word merchandise, as used in this title, may include goods, wares and chattels of every description capable of being imported”—is sufficiently broad to include placer gold. The law contrary to which the importation of any merchandise subjects it to forfeiture provides that all merchandise imported into the United States must be invoiced, and that such invoices shall be produced to the consul, vice-consul, or commercial agent of the United States, and that, whenever merchandise imported into the United States is entered by invoice, a declaration shall be filed with the collector of the port at the time of entry by the owner, importer, assignee, or agent. Rev. Stats. U. S., sec. 2851 et seq. [U. S. Comp. Stats. 1901, p. 1901]; 1 Supp. Rev. Stats. U. S., p. 745 et seq. The allegations of the information were sufficient to charge non-compliance with, and thereby the violation of, the revenue law above cited, and the demurrer was properly overruled.

It is conceded that the six parcels of placer gold were not dutiable goods, and that parties have a right to import the

same without the payment of duty; but the further statement, both in the demurrer and in the assignment of error, that the government is not injured or defrauded by the failure to declare the same, as alleged, does not necessarily follow, and is not correct. Paragraph 2851 of the Revised Statutes of the United States provides: "For every verification of an invoice and certificate before a consul or commercial agent, such consul or commercial agent shall be entitled to demand and receive from the person making the same, a fee of two dollars and fifty cents." This is a provision of the law in general terms, from which non-dutiable goods are not excepted. The law relative to invoices and declarations plainly states that all merchandise imported into the United States must be invoiced, and that, whenever merchandise imported into the United States is entered by invoice, a declaration shall be filed with the collector of the port at which the entry is made, and that, for every verification of an invoice and certificate before a consul or commercial agent, such consul or commercial agent shall be entitled to demand and receive a fee. That the law contemplates this invoice and declaration in the case of non-dutiable as well as dutiable goods is evidenced by the provisions of section 4 of the act of June 10, 1890, c. 407, 26 Stats. 131, 1 Supp. Rev. Stats. U. S., p. 745 [U. S. Comp. Stats. 1901, p. 1889], which provides that the secretary of the treasury may make regulations by which books, magazines, and other periodicals published and imported in successive parts, numbers, or volumes, and entitled to be entered free of duty, shall require but one declaration for the entire series. The mention of this special ruling in regard to one class of non-dutiable goods shows conclusively that the effect of this law on non-dutiable goods was not overlooked at the time of the congressional legislation, but that the invoice and declaration were intended to be made for non-dutiable as well as dutiable goods. In conformity with this construction of the law, the United States supreme court held in the case of *United States v. Mosby*, 133 U. S. 273, 10 Sup. Ct. 327, 33 L. Ed. 625, that there can be no entry of non-dutiable goods without a properly certified invoice, and that, as required by the consular regulations, "all invoices of importations from countries in which there are 'consular officers' must, before the shipment of the merchandise, be

produced to and authenticated by the United States consular officer nearest the place of shipment for the United States." In reference to this provision of the law, Mr. Justice Blatchford, in the opinion, further said: "It is entirely clear that the question of determining whether goods to be shipped will, when imported into the United States, be free from duty, is a question which cannot be left to the determination of a consul. It often involves intricate points of fact and of law, and must be as wholly cognizable by the proper officers and tribunals of the United States appointed for the purpose, as the question of the proper rate of duty on dutiable goods"—and therefore held that the fees received by the consul, collector, or agent of the United States for the verification of such invoices and certificates are for official services, and belong to the United States. To the same effect, *Phelps v. Siegfried*, 142 U. S. 602, 12 Sup. Ct. 391, 35 L. Ed. 1128. This being the case, the importation of non-dutiable goods without invoicing the same and obtaining the certificate of such consular agent, and without entering the same by formal declaration at a port of entry at the office of the collector of customs, is not only contrary to law, but does injure and defraud the government to the extent of the fees for the verifications and certificates required in such cases by the revenue laws.

The claimant asked the court to instruct the jury that, before forfeiture could be made, it must be determined that the said gold was imported into the United States with the intent to defraud the United States, and excepted to the refusal of the court to so instruct. In this the claimant relied upon paragraph 16 of the act of June 22, 1874, c. 391, 18 Stats. 189, which makes it the duty of the court, in all actions to declare the forfeiture of any goods, wares, or merchandise by reason of any violation of the revenue laws, to submit to the jury, as a distinct and separate proposition, whether the alleged acts were done with intent to defraud the United States, and to require upon such proposition a special finding by such jury, and provides that in such cases, unless intent to defraud shall be so found, no forfeiture shall be imposed. This provision is cited with approval by the supreme court of the United States in *Friedenstein v. United States*, 125 U. S. 224, 8 Sup. Ct. 838, 31 L. Ed. 736.

But paragraph 16 of the act of June 22, 1874, containing this provision, was repealed by section 29 of the act of June 10, 1890, c. 407, 26 Stats. 141, 1 Supp. Rev. Stats. U. S. 755 [U. S. Comp. Stats. 1901, p. 1897], and no similar provision was enacted in place thereof, so that, however harsh the present law may appear to be, it nevertheless is the law now in force, and fully sustains the ruling of the court in refusing the instruction requested by claimant.

The record disclosing no error, the judgment of the lower court is affirmed.

Kent, C. J., and Sloan, J., concur.

[Civil No. 837. Filed March 26, 1904.]

[76 Pac. 479.]

SILVER QUEEN MINING COMPANY, a Corporation,
Plaintiff and Appellant, v. CHARLES CROCKER et al.,
Defendants and Appellees.

1. TAX-TITLE — TAX-DEED — PRIMA FACIE VALIDITY — IMPROVEMENTS — LIEN FOR — LAWS 1893, p. 130, ACT NO. 84, SECS. 20, 26, CONSTRUED. — Section 20, *supra*, provides that if property sold for taxes is not redeemed the collector must make the purchaser a deed; that the purchaser must, thirty days prior to the expiration of the time for redemption or before applying for a deed, serve on the owner a written notice, etc.; that no deed shall be issued to the purchaser until he files an affidavit showing that the notice has been given; and that, when the territory purchases, the clerk of the board of supervisors shall give the notice and make the affidavit. Section 26, *supra*, provides that if the holder of a tax-deed or a claimant under him be defeated in an action for the recovery of property, the successful claimant shall be obliged to pay the value of all improvements made by the purchaser or claimant and such amount shall be a lien on the property. Tax-deeds to the territory showed that the clerk of the board of supervisors had filed with the tax-collector an affidavit reciting that he had personally served on the owner and occupant a written notice, and that more than thirty days had elapsed since said service. Said service had not in fact been made, but claimant relying on recitals had made extensive improvements on the property. *Held*, that

although the plaintiff had established that the tax-deeds were invalid, and therefore claimants under the territory had no title, nevertheless the deeds were valid on their face, and entitled the claimants to lien for such improvements.

2. ~~SAME—SAME—SAME—RECITALS—EVIDENCE.~~—When the recitals in a tax-deed indicate the proper exercise of the powers granted in the manner required by the law, it is *prima facie* valid; but when the deed itself discloses it is executed in violation of law, or that there is a non-compliance with a substantial requirement of the law, it is void and not admissible in evidence.
3. ~~SAME—SAME—SAME—SAME—SAME.~~—Recitals in tax-deeds being but *prima facie* evidence, can be defeated by evidence to the contrary.
4. ~~SAME—SAME—~~ACT NO. 84, p. 132, LAWS 1893, SEC. 26, CONSTITUTIONAL.—The statute, *supra*, providing that in the event of the defeat of the claimant under a tax-deed the successful party shall be adjudged to pay, before being let into possession, the value of all improvements made by the said purchaser or persons claiming under him on such property, is constitutional.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. George R. Davis, Judge. Affirmed.

The facts are stated in the opinion.

Galpin & Bolton, and Hereford & Hazzard, for Appellant.

Defendants cannot be buyers in good faith, because the findings show that they entered under a deed and record which established that the territory had given no notice to the owner of the property taxed of intention to apply for the deed.

Such deed, therefore, did not operate to foreclose the lien. It gave the buyer from the territory no color of title. The buyer, then, neither bought in good faith nor had color of title. Such a buyer cannot improve the owner out of his estate.

The act of the territory in taking the deed without notice of application was a wrongful act, and could confer on it or its grantee with notice no right even of entry—no right to demand pay for improvements. *Reed v. Lyons*, 96 Cal. 504, 31 Pac. 619; *Miller v. Miller*, 96 Cal. 376, 31 Am. St. Rep. 229, 31 Pac. 247; *Landregan v. Peppin*, 86 Cal. 126, 24 Pac. 859; *Hughes v. Cannedy*, 92 Cal. 386, 28 Pac. 573.

It cannot be urged that the buyer was an innocent purchaser for value without notice, for the law is settled where a power is exercised in the name of the donor, and as agent for the donor, the power and authority given by the donor must appear in the instrument under which the officer acts. *French v. Edwards*, 13 Wall. 515; *Grimm v. O'Connell*, 54 Cal. 522; *Donahue v. McNulty*, 24 Cal. 412, 85 Am. Dec. 78; *Wiseman v. McNulty*, 25 Cal. 230; *San Francisco v. Canavan*, 42 Cal. 541; *McCracken v. City of San Francisco*, 16 Cal. 591.

That the above doctrine is the rule of the federal courts, see *Moore v. Brown*, 11 How. 414, 13 L. Ed. 751; *Redfield v. Parks*, 132 U. S. 239, 10 Sup. Ct. 83, 33 L. Ed. 327; *Walker v. Turner*, 9 Wheat. 541, 6 L. Ed. 155; *Daniels v. Case*, 45 Fed. 843; *Coulter v. Stafford*, 56 Fed. 564; 6 C. C. A. 18.

That part of the statute of Arizona is unconstitutional which gives to the defeated holder of a tax-deed, or any one holding under him, the right to recover for improvements placed upon the property held thereunder. *Billings v. Hall*, 7 Cal. 1; *Anderson v. Fish*, 36 Cal. 633; *Lawson v. Jeffries*, 47 Miss. 706, 12 Am. Rep. 354; *Taylor v. Porter*, 4 Hill, 140, 40 Am. Dec. 274; *Wilkinson v. Leland*, 2 Pet. 627, 7 L. Ed. 542; *Green v. Biddle*, 8 Wheat. 1, 5 L. Ed. 547.

S. M. Franklin, for Appellees.

DOAN, J.—In an action to quiet the title to the Silver Queen Mine, brought by the patentee against Crocker et al., holding under tax-deeds from the territory, the trial court held that the deeds from the tax-collector to the territory were invalid, that the title was in the plaintiff, and that the defendants in good faith had made improvements on the property to the value of \$7,465, which sum was a lien upon the property, and decreed that the plaintiff be let into possession of the property on the payment thereof. From that part of the judgment holding the improvements to be a lien on the property, and decreeing the payment therefor by the claimant as a condition precedent to the entry into possession, the plaintiff has appealed, and assigns as error that "the court erred in its . . . judgment that . . . the value of the improvements . . . was a lien upon the property, and should be paid . . . before said claimant should be let into possession of the property."

It was found as a fact by the court that, in the case of each of the tax-deeds to the territory, "no notice of application for said deed was given or served by the clerk of the board of supervisors as required by law." It was found, as a conclusion of law, "that each and all of said tax-deeds executed to the territory of Arizona, under which the defendants Crocker and Scrivner, as the grantees of the territory, claim title, are invalid." It was also found, as a fact, "that after the execution of said deeds to Crocker he went into possession of the property, claiming said property in good faith; that on April 11, 1900, Crocker conveyed an undivided one-half interest in said property to defendant Scrivner." The only ground on which the tax-deeds to the territory were attacked was that no notice of application for such deeds was given as required by law, and on that ground they were found invalid. We have before us only the findings and judgment of the court, and the deeds in question filed as exhibits. The minutes of the court show that several witnesses were sworn and testified, but none of the oral testimony given at the trial is preserved in the record.

The law under which notice of application for tax-deeds is required to be given provides (Act No. 84, p. 130, Laws 1893, sec. 20): "If the property is not redeemed within the time allowed by the law for its redemption, the collector or his successor in office must make to the purchaser or his assignee a deed to the property. . . . The purchaser of property sold for delinquent taxes, or his assignee, must, thirty days previous to the expiration of the time for the redemption, or thirty days before he applies for a deed, serve upon the owner of the property purchased, or upon the person occupying the property if said property is occupied, a written notice reciting that said property or a portion thereof has been sold for delinquent taxes, giving the date of the sale, the amount of property sold, the amount for which it was sold, the amount then due, and the time when the right of redemption will expire or when the purchaser will apply for a deed, and the owner of the property shall have the right of redemption indefinitely until such notice shall have been given and the said deed applied for, upon payment of the fees, percentage, penalty and costs required by law, . . . and no deed of the property sold at a delinquent tax-sale

shall be issued by the tax-collector or any other officer to the purchaser of such property until after such purchaser shall have filed with such tax-collector or other officer an affidavit showing that the notice hereinbefore required to be given has been given as herein required. . . . When the territory becomes the purchaser, the clerk of the board of supervisors . . . shall give the notice and make the affidavit. . . ."

The question presented is whether the deeds to the territory were valid on their face, and therefore, until attacked and defeated by extrinsic facts showing their invalidity, were sufficient to give to a purchaser from the territory the right of possession, and authorize him to improve the property, or whether they were void upon their face, indicating to a purchaser that the title of the territory was invalid, and therefore insufficient for such purpose. This can be best determined by testing the deed by reference to the authority recited in it for its execution, in connection with the act giving the officer the power to make it. When the recitals in the deed indicate the proper exercise of the powers granted, in the manner required by the law, it is held to be *prima facie* valid. It is not necessary that it be sufficient to withstand all evidence brought against it to show that it is bad, but it must appear to be good upon its face. When, however, the deed itself discloses that it is executed in violation of the law, or bears upon its face the evidence of non-compliance with a substantial requirement of the law, it is upon its face absolutely null and void, and not admissible in evidence for any purpose. It does not give constructive possession nor the right of actual possession. *Moore v. Brown*, 11 How. 414, 13 L. Ed. 751; *Gomer v. Chaffey*, 6 Colo. 314; *Redfield v. Parks*, 132 U. S. 239, 10 Sup. Ct. 83, 33 L. Ed. 327; *Seaverns v. Costello*, *ante*, p. 308, 71 Pac. 930. Two deeds from the tax-collector to the territory, the one executed on April 18, 1898, in pursuance of the sale made on the 18th of April, 1896, and the one made on September 14, 1899, in pursuance of the sale made on the 14th of April, 1898, are valid on their face, fully showing the authority of the tax-collector to execute them. The requirement of the law reads: "No deed shall be issued by the tax-collector to the purchaser until after such purchaser shall have filed with such tax-collector or other officer an affidavit showing that the notice

hereinbefore required to be given has been given as herein required." Each of the deeds mentioned contains the recital of the filing of such affidavit with the tax-collector, showing the service of notice as required in each instance, in the following language:—

"Whereas, Fred G. Hughes, the clerk of the board of supervisors . . . has filed with Charles F. Hoff, treasurer and *ex officio* tax-collector . . . an affidavit showing that he, the said Fred G. Hughes, as such clerk, personally served upon Silver Queen Mining Co., the owner of the above described property, . . . the person occupying the above described property, a written notice, stating that said property had been sold to the territory of Arizona for delinquent taxes on the 18th day of April, 1896; the amount for which it was sold; the time for redemption and when the purchaser would apply for the deed unless said property was redeemed, and the amount of redemption money then due; and required . . . and whereas, more than thirty days have elapsed since the service of said notice. . . ."

"Whereas, W. P. B. Field, the clerk of the board of supervisors . . . has filed with Harry A. Drachman, treasurer and *ex officio* tax-collector . . . an affidavit showing that he, the said W. P. B. Field, as such clerk, personally served upon Silver Queen Mining Co., the owner of the above described property, . . . the person occupying the above described property, a written notice, stating that said property had been sold to the territory of Arizona for delinquent taxes on the 14th day of April, 1898; the amount for which it was sold; the time for redemption and when the purchaser would apply for the deed unless said property was redeemed, and the amount of redemption money then due; and required . . . and whereas, more than thirty days have elapsed since the service of said notice. . . ."

Whether the recitals in these deeds relative to the affidavits of such service were overcome by the production of the affidavits themselves, which fail to sustain such recitals, or whether the affidavits were disproved by evidence controverting their statements relative to the giving of notice, we are not advised. The recitals in the deeds, being but *prima facie* evidence, can be defeated by positive evidence to the contrary. *Simmons v. McCarthy*, 118 Cal. 622, 50 Pac. 761.

These deeds are shown by comparison with the requirements of the statute to be valid when tested by their own face. They present *prima facie* evidence of good title in the territory, so that a purchaser is authorized to rely on them in good faith; and, unless their recitals are defeated by evidence *aliunde*, they will sustain such purchaser's title. That being the case, they fully justify such purchaser in improving the property, and sustain the decree of the court adjudging such improvements a lien upon the property upon the defeat of his title thus acquired, and the payment therefor a condition precedent to the plaintiff being let into possession of the premises. The statute on this subject (sec. 26, act No. 84, p. 132, Laws 1893) provides: "If the holder of the tax-deed, or any one claiming under him by virtue of such tax-deed, be defeated in an action by or against him for the recovery of the land sold or the possession thereof, the successful claimant shall be adjudged to pay to the holder of the tax-deed or the party claiming under him by virtue of such deed, before such claimant shall be let into possession . . . the value of all improvements made by the said purchaser or persons claiming under him on such property. . . . Such claim or amount so found to be due shall be and is hereby declared to be a lien upon such property included in said deed." The territory was the original holder of the tax-deeds, and Crocker, as the grantee of the deeds executed by the territory, was claiming under it as such holder, and as a party so claiming was defeated in the action for the recovery of the land. Under these facts, by the provisions of the statute, it was the duty of the court to decree the payment to him, by the successful claimant, of the value of the improvements. *Knowles v. Martin*, 20 Colo. 393, 38 Pac. 467.

It is urged by the appellant that the statute above quoted is fatally defective in not limiting the right of recovery for improvements to such holders of tax-deeds as enter under color of title and put on their improvements in good faith; and that the act is plainly unconstitutional because it compels the owner to pay for improvements made by a person buying a tax-deed with knowledge of its invalidity. We do not understand that a person buying a tax-deed with knowledge of its invalidity could hold such property in good faith, or that, under the law as cited above, a deed void on its face would

give such possession as would authorize a person to recover for improvements made upon property held under it. The party in this action claiming under the holder of the tax-deed having entered under color of title and put on the improvements in good faith without knowledge of the invalidity of the tax-deed, renders unnecessary the consideration of the question as proposed. There is no good reason why the common rule, that an adverse claimant in good faith who has improved real estate may recover the value of his betterments when he is compelled to surrender them with the land, should not apply to those holding under tax-deeds issued under statutes that provide for the repayment to the tax purchaser of money expended by him in good faith in improvements on the land, in the event of the defeat of his title. The right of the legislature to make such requirements of the original owner as a condition precedent to the recovery of lands sold for taxes must now be considered as conclusively settled. Cooley on Taxation, 371; Black on Tax Titles, 2d ed., 437. There can be no serious question as to the constitutionality of the Arizona statute on this subject.

No error appearing in the record, the judgment of the lower court is affirmed.

Kent, C. J., and Sloan, J., concur.

[Civil No. 848. Filed March 26, 1904.]

[76 Pac. 476.]

E. B. PERRIN, Defendant and Appellant, v. MALLORY COMMISSION COMPANY, Plaintiff and Appellee.

1. PLEADING AND PRACTICE — ANSWER — DEMURRER — PLEA IN BAR — AMENDMENT—REV. STATS. ARIZ. 1901, PARS. 1288, 1293, 1350, CONSTRUED.—Under paragraph 1350, *supra*, providing that the defendant in his answer may plead as many defenses as he may have, but such pleas must be separately stated in one answer, filed at the same time, and in the following order: “(5) Demurrer. (6) In bar of the right to sue,” paragraph 1288, *supra*, providing that all pleadings or proceedings may, upon leave of court, be amended at any stage of the action, or they may be amended

before trial, without leave, upon serving the adverse party with a copy, and paragraph 1293, *supra*, providing that the court shall disregard any error or defect in the pleadings which shall not affect the substantial rights of the parties, and no judgment shall be reversed or affected on account thereof,—a general demurrer is an answer which before trial may be amended, as a matter of right, by alleging matters in bar of an action.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Coconino. R. E. Sloan, Judge. Reversed.

The facts are stated in the opinion.

E. M. Doe, and Joseph H. Kibbey, for Appellant.

E. E. Ellinwood, for Appellee.

DAVIS, J.—On the nineteenth day of March, 1903, the Mallory Commission Company brought an action in the district court of Coconino County against E. B. Perrin to recover upon a promissory note alleged to have been executed by the defendant to the plaintiff company. For his answer to the complaint, the defendant on April 15, 1903, filed a general demurrer only. This was the state of the pleadings when the ensuing term of the district court opened, September 21, 1903. On the second day of the term, and before the trial of said cause, the defendant served upon the plaintiff, and filed with the clerk, an amended answer alleging matters of defense in bar of the said action. Thereupon the plaintiff moved to strike this amended answer from the files because it set up for the first time matters in bar which were not pleaded and filed with the answer of April 15, 1903, and the plaintiff also asked for a judgment on the pleadings. The record shows that on September 25, 1903, the court overruled the demurrer to the complaint and granted the motion of the plaintiff. Judgment was rendered upon the pleadings in favor of the plaintiff, from which the defendant now appeals.

It is assigned that the court erred in striking the amended answer from the files, and in rendering judgment in the plaintiff's favor upon the pleadings. The case, we think, presents but one question: Was the amended answer such an amendment as the defendant could file as a matter of right? No

point was made against its sufficiency in allegations to state a defense to the action, but the ruling of the court was invoked and based solely upon the ground that the answer which contained the defense was not filed in the time and manner required by law. This necessarily leads to a consideration of several provisions of our statutes relating to pleadings and amendments which would seem to bear more or less directly upon the question which is here involved. Paragraph 1350 of the Revised Statutes of 1901 provides:—

“The defendant in his answer may plead as many defenses as he may have; but such pleas must be separately stated in one answer, filed at the same time and in the following order: (1) Denying the jurisdiction of the court. (2) In abatement of the suit. (3) To strike from the complaint irrelevant, redundant or uncertain matter. (4) To make the complaint definite and certain. (5) Demurrer. (6) In bar of the right to sue. (7) Denying the facts constituting the cause of action. (8) Set-off and counterclaim.”

Paragraph 1288 provides:—

“All pleadings or proceedings may upon leave of the court be amended at any stage of the action within such time as the court may prescribe, or they may be amended before trial without such leave upon serving the adverse party with a copy of such amended pleading or proceedings.”

Again it is provided in paragraph 1293 that “the court shall in every stage of an action disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect.”

The only pleading of the defendant under our code is an answer. According to the system of pleading in general prevalence, a demurrer is not an answer, but rather a reason for not answering. In Arizona and Texas, however, a demurrer is treated as a defense, and is required to be pleaded in the answer. The provision of the Texas Code is as follows (Rev. Stats. 1895, art. 1262): “The defendant in his answer may plead as many several matters, whether of law or fact, as he shall think necessary for his defense, and which may be pertinent to the cause; provided, that he shall file them all at the same time, and in due order of pleading.” In Texas the courts have by construction determined what is “due

order of pleading," and this has been done by recourse to the order of pleading by the defendant at common law. Our statute prescribes the order in which the defenses shall be stated. In Texas (Rev. Stats. 1895, art. 1188) "the pleadings may be amended under leave of the court, upon such terms as the court may prescribe, before the parties announce themselves ready for trial, and not thereafter." The courts of Texas do not hold that the failure to plead all defensive matters in the original answer precludes the subsequent pleading of an omitted defense, nor that the omission to plead said matters in their due order cannot be remedied by amendment. On the contrary, the provision with respect to amendments is construed with great liberality, and is made applicable alike to the pleadings of both plaintiff and defendant. It is the established practice there to permit the plaintiff to amend, within the period prescribed, by entirely changing his cause of action, and the defendant by setting up a new defense. *Williams v. Randon*, 10 Tex. 74; *Smith v. McGaughey*, 13 Tex. 464; *Hopkins v. Wright*, 17 Tex. 30; *Irvine v. Bastrop*, 32 Tex. 485; Rules, 47 Tex. 619; *Lewis v. Alexander*, 51 Tex. 578; *McLane v. Paschal*, 62 Tex. 102; *Wiebusch v. Taylor*, 64 Tex. 53; *Woods v. Huffman*, 64 Tex. 98; *Merchant v. Bowyer*, 3 Tex. Civ. App. 367, 22 S. W. 763; *Gulf etc. Ry. Co. v. Butler* (Tex. Civ. App.) 34 S. W. 756. Statutes of amendment are remedial in character, and are to be construed and applied liberally in favor of the privilege of amending. Upon this proposition there will be found no dissenting authorities. Courts have also expressly declared that greater liberality will be exercised in allowing a defendant to amend his answer than in permitting the plaintiff to amend his complaint. *Thorn v. Smith*, 71 Wis. 24, 36 N. W. 707; *Cayce v. Ragsdale*, 17 Mo. 32; *Garrison v. Goodale*, 23 Or. 307, 31 Pac. 709; *Young v. Gay*, 41 La. Ann. 758, 6 South. 608. A very good reason for the existence of this rule is that the plaintiff may take a nonsuit and commence another action, whereas the defendant, if denied the privilege of amending, might be without remedy. Our own statute relating to amendments is so liberal that it would be difficult to extend it by construction, and we are not at liberty to place upon it limitations which the legislature has not seen fit to prescribe. It is not declared that the pleadings of the plaintiff alone

may be amended, nor yet that the amendment shall be only of the cause of action or the defense already stated, but the broad language of paragraph 1288 is that "all pleadings or proceedings may . . . be amended." And this may be done "upon leave of the court . . . at any stage of the action," or "before trial without such leave upon serving the adverse party with a copy of such amended pleading or proceedings." We think the statute plainly contemplates that any amendment which, during the progress of the action, the court would have power to permit in furtherance of justice, may before trial be made by the party, as a matter of right, upon the service thereof as prescribed. It would also seem clear that if, as held in Texas, a new cause of action or defense may properly be introduced by amendment "under leave of the court . . . before the parties announce themselves ready for trial," there would be at least equal warrant for the same practice under a statute which permits amendments to be made "before trial without such leave." The code provisions of the various states relating to amendments are far from uniform. There will, however, generally be found in them some limitation the effect of which operates to prevent any substantial change of the claim or defense. No such limitation is expressed in our statute, and we feel compelled, therefore, to give it the broad interpretation which its plain terms seem to require. As we have previously observed, the only pleading of the defendant under our code is an answer. If the answer consists of but a demurrer, it is nevertheless an answer and a pleading. While the requirement is that the answer must contain all of the defenses, and in a certain order, it does not follow that, if there has been an omission in this respect, it cannot be remedied by amendment. To deny the power of the court to permit of such an amendment would in many cases be equivalent to a denial of justice. To admit it is also to admit the right of the defendant to make the same amendment "before trial without such leave." But the latter is unquestionably the true intent and meaning of the law as it stands. The legislature had the right to make our system of pleading as illogical and unscientific as it chose. If it be found, in practice, to operate unfavorably to the orderly and speedy administration of justice, relief must be sought at the fountain.

The defendant had the right, under the statute, at any time before trial, to amend his pleading by setting up the new defense, and the court erred in striking the amended answer from the files and refusing to consider it. For this error, the judgment must be reversed, and the cause remanded to the district court for a new trial.

Kent, C. J., and Doan, J., concur.

[Criminal No. 175. Filed March 26, 1904.]

[76 Pac. 476.]

ERNEST HALL, Defendant and Appellant, v. TERRITORY
OF ARIZONA, Plaintiff and Respondent.

1. CRIMINAL LAW—PRACTICE—APPEAL—REV. STATS. 1901, PEN. CODE, SEC. 1067, CONSTRUED.—No appeal can be taken from a judgment of the district court rendered in a case appealed from a justice court, such appeal being expressly prohibited by the statute, *supra*.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Navajo. R. E. Sloan, Judge. Dismissed.

The facts are stated in the opinion.

Klock & Owen, and W. H. Burbage, for Appellant.

E. W. Wells, Attorney-General, and E. S. Clark, District Attorney, and Joseph E. Morrison, for Respondent.

THE COURT.—The appellant in this case was tried before a justice of the peace upon a misdemeanor charge, and was convicted. He appealed to the district court, where a trial *de novo* again resulted in a judgment of conviction. He now seeks to prosecute a further appeal to the supreme court. From this he is debarred by section 1067 of the Penal Code of 1901, which provides: “. . . There shall be no appeal from a judgment of the district court rendered in a case appealed from a justice, police, or recorder’s court.”

The appeal will therefore be dismissed.

[Civil No. 833. Filed March 26, 1904.]

[76 Pac. 478.]

**CHARLES MACRITCHIE et al., Plaintiffs and Appellants,
v. HELENA STEVENS et al., Defendants and Ap-
pellees.**

1. **JUDGMENT—ACTION TO SET ASIDE—SICKNESS OF ATTORNEY—SHOW-
ING—SUFFICIENCY.**—In an action to set aside a judgment of fore-
closure complainants alleged that they were non-residents of Ari-
zona, that they relied exclusively upon their attorney for informa-
tion as to what occurred in the local courts, and that they were
ignorant of the entry of the said judgment until two years there-
after; that their attorney at the date of the entry of judgment
was sick and not in a condition of mind and body to properly at-
tend to their business, and did not know of the entry of judgment;
that shortly after the entry thereof he died. The name of the
attorney appeared both in the answer and the agreed statement of
facts, and the transcript of the minute entries shows his presence in
court in their behalf on the day when the case was submitted, and
also on the day when the judgment was rendered. There was no
evidence to sustain the allegations respecting the attorney's inca-
pacity, his ignorance of the fact of judgment, or concerning the
time of his death. *Held*, that no sufficient showing was made to
entitle complainants to have the judgment set aside.
2. **SAME—SAME—EQUITY—WHEN WILL INTERFERE.**—Courts of equity
will not interfere to grant relief against a judgment unless it ap-
pears that the party complaining could not avail himself of his
defense in the action, or that he was prevented from doing so by
fraud, accident, or mistake, without fault or negligence on his part.
3. **APPEAL AND ERROR—ASSIGNMENTS OF ERROR—MUST RELATE SOLELY
TO THE CASE APPEALED.**—On appeal in an action to set aside a
judgment assignments of error alleged to have been committed
in the trial of the action sought to be set aside cannot be con-
sidered.

APPEAL from a judgment of the District Court of the
Second Judicial District in and for the County of Pinal.
F. M. Doan, Judge. Affirmed.

The facts are stated in the opinion.

W. H. Griffin, for Appellants.

J. E. O'Connor, for Appellees.

DAVIS, J.—On February 11, 1902, Charles MacRitchie and John Nichol brought an action in the district court of Pinal County against the appellees, Helena Stevens, Mary Truman, Margaret Phy, and W. C. Truman, sheriff, to set aside a judgment of said court, entered on February 27, 1900, foreclosing a mortgage on certain lands in said county, and also to restrain the sheriff from proceeding with the sale of said lands under said judgment. As grounds for the relief thus sought, the plaintiffs alleged their ownership of the real estate affected, that they were without knowledge of the rendition of said judgment, that the same was based upon various errors of law and fact, and that a sale thereunder would cast a cloud upon their title. The complaint was answered, and there was a trial upon the issues, which resulted in a judgment on May 9, 1903, denying to the plaintiffs the relief for which they prayed. The appeal is from this judgment.

Of the ten assignments of error contained in the brief of the appellants, only the seventh is entitled to consideration under the rules of this court. This assignment alleges: "The court erred in refusing to set aside the judgment of February 27, 1900, on the ground that the defendants then—plaintiffs and appellants now—had no knowledge of the pendency of the action, and were deprived of an earlier defense to the judgment." The foreclosure suit in which the judgment of February 27, 1900, was entered, was No. 936 upon the records of the district court. The appellees, other than the sheriff, were the plaintiffs in that case. Charles MacRitchie, Americus L. Pogue, and Edwin P. Drew were the defendants therein. It does not appear, however, that the appellant John Nichol was a party to the suit, or that he was in any position to be affected by the judgment therein. The record shows that an answer was filed and a defense made on behalf of the defendants MacRitchie and Pogue, and that the case was submitted to the court upon an agreed statement of facts, signed by the attorneys for the respective parties. The name of W. R. Stone, Esq., appears both in the answer and the agreed statement of facts as attorney for said defendants, and the transcript of the minute entries shows his presence in court in their behalf on the day when the case was submitted, and also on the day when the judgment was rendered.

In the complaint which was filed by the appellants in the case now before us, we find the following averments: "Complainants allege that they were and are now non-residents of the territory of Arizona, residing in Chicago, Illinois, and not familiar with what was passing in the courts of Arizona, and for that information depended exclusively upon their attorney, W. F. Stone, a resident of Florence, Arizona. Complainants never knew of the entry of the judgment of February 27, 1900, until about the 18th day of January, 1902. . . . Complainants were never informed by W. R. Stone, their local attorney, of the existence of said judgment aforesaid. . . . If they had known of it, they would have taken prompt action to have the same reversed or set aside. Complainants further allege, upon information and belief, and they verily believe, that, at the date of the entry of the judgment aforesaid, W. R. Stone was a very sick man, and not in a condition of mind and body to properly attend to complainants' business, and that he did not know of the entry of said judgment; that said attorney a few months thereafter departed this life, otherwise he would have informed complainants of the same." It thus appears affirmatively from the allegations of their own pleading that the attorney who, as the records show, conducted the defense of case No. 936, was the authorized representative of the appellants. There was no evidence whatever introduced on the trial to sustain the allegations respecting Mr. Stone's incapacity, his ignorance of the fact of the judgment, or concerning the time of his death, while, on the other hand, as we have seen, the minute entry recites that he was in court at the rendition of the judgment. In a majority of the states the courts have steadily refused to set aside a judgment on the sole ground of the neglect or carelessness of the attorney for the party against whom it was rendered. The act or omission of the attorney is the act or omission of the client, and no negligence will be excusable in the former which would not be excusable in the latter. Black on Judgments, 2d ed., sec. 341, and the author's citation of cases. The principle is well settled that courts of equity will not interfere to grant relief against a judgment unless it appear that the party complaining could not avail himself of his defense in the action, or that he was prevented from doing so by fraud, accident, or mistake, without fault

or negligence on his part. Each and all of these grounds of equity jurisdiction are wholly wanting in the present case.

The first, second, third, fifth, and tenth assignments of error are but general and indefinite. They point us to nothing specific, and utterly fail to comply with the express provision of our rules. The fourth, sixth, eighth, and ninth assignments are of errors alleged to have been committed on the trial of case No. 936, and cannot be considered in the case at bar. Of the former case, it is only necessary to say that it appears the court had jurisdiction of the parties and of the subject-matter, and rendered a valid judgment.

We have carefully examined the proceedings in the case which is before us on this appeal, and can find no ground which would warrant us in disturbing the judgment of the lower court. That judgment will therefore be affirmed.

Kent, C. J., and Sloan, J., concur.

[Criminal No. 165. Filed March 26, 1904.]

[76 Pac. 455.]

JOSEPH DENT, Defendant and Appellant, v. UNITED STATES OF AMERICA, Plaintiff and Respondent.

1. CONSTITUTIONAL LAW—CRIMINAL LAW—FOREST RESERVES—PRIVATE USE—RULES AND REGULATIONS OF SECRETARY OF INTERIOR—INFRACTION OF—CRIMINAL—ACT OF CONGRESS OF JUNE 4, 1897, 30 STATS. 33, CONSTITUTIONAL—ACT OF CONGRESS OF JUNE 4, 1888, 25 STATS. 166, AMENDING REV. STATS. U. S., SEC. 5388, CITED.—The act of Congress of June 4, 1897, *supra*, providing that the secretary of the interior may make rules and regulations to regulate the occupancy and use of forest reservations and to preserve the forests thereon, and further providing that any violation of such rules and regulations shall be punished as is provided for in the act of Congress of June 4, 1888, amending section 5388 of the Revised Statutes of the United States, is not an unconstitutional delegation of power to the secretary of the interior.
2. UNITED STATES CIRCUIT COURT OF APPEALS—DECISIONS—BINDING ON SUPREME COURT, WHEN.—Inasmuch as the circuit court of appeals is a court exercising appellate jurisdiction over the supreme court in criminal cases of this character, the supreme court is bound by its determination on this question, although the record may prevent an appeal being taken to that court in this particular case.

APPEAL from a judgment of the District Court of the Fourth Judicial District. R. E. Sloan, Judge. Affirmed. On Rehearing.

E. M. Doe, and E. S. Clark, for Appellant.

F. S. Nave, United States Attorney, and J. H. Campbell, Assistant United States Attorney, for Respondent.

The appellant was convicted of the crime of pasturing sheep upon the public lands in a forest reservation in violation of the rules of the secretary of the interior, promulgated under authority of the act of Congress of June 4, 1897 (30 Stats. L. 35); which act provides that any violation of such rules shall be punished by fine or imprisonment. The former opinion of the court will be found on page 138, *ante*, 71 Pac. 920.

KENT, C. J.—A rehearing having been granted at this term of court, this case has been again argued by counsel. Since we rendered our decision at a former term, the case of *Dastervignes v. United States*, 122 Fed. 30, 58 C. C. A. 346, has been reported. In that case the circuit court of appeals for the ninth circuit has held that the act in question did not delegate legislative power to the secretary, and was not unconstitutional. Inasmuch as under the act creating the circuit courts of appeal, such court exercises appellate jurisdiction over this court in criminal cases such as the one at bar, we feel that a decision of that court, although made in a civil and not a criminal case, expressly holding that the act in question is constitutional and a valid delegation of power, is binding upon us in this case; and if it be true that the sole question involved in this case is the constitutionality of the act, and an appeal will not lie in this case from our decision to the circuit court of appeals,—a question which it is not proper for us to determine,—we still feel that the determination of the circuit court of appeals is binding upon us. An appeal does not lie from our decision in this case to the supreme court of the United States, and yet, if such court had determined the question of the constitutionality of the act, such determination would be binding upon us. Inasmuch as the circuit court of appeals is a court exercising appellate jurisdiction over us in criminal cases of this char-

acter, we are in like manner bound by its determination upon this question, although the record may prevent an appeal being taken to such a court in the particular case before us. Indeed, if it be true that no appeal lies to any court from our decision in capital cases, or in criminal cases where the constitutionality of a federal statute is the sole question involved, but the right of review of our decisions in criminal cases is confined to the appellate jurisdiction of the circuit court of appeals in minor criminal cases, and when less important questions are involved, this somewhat anomalous condition of the law should not prevent our recognizing the binding force of a determination of such circuit court of appeals upon such constitutional question, since, if the record in this case presented other questions for review, thereby giving it jurisdiction, such court undoubtedly would have the right to, and would, review in connection therewith our determination upon the constitutional question involved. Therefore, if it be that the correctness of our determination upon the constitutional question cannot be passed upon by such court in this particular case, it is perhaps for that reason all the more incumbent upon us to follow in the path marked out for us by that court. *Farnsworth v. Montana*, 129 U. S. 104, 9 Sup. Ct. 253, 32 L. Ed. 616; *Cross v. United States*, 145 U. S. 571, 12 Sup. Ct. 842, 36 L. Ed. 821; *Chapman v. United States*, 164 U. S. 436, 17 Sup. Ct. 76, 41 L. Ed. 504; *In re Heath*, 144 U. S. 92, 12 Sup. Ct. 615, 36 L. Ed. 358; *Carter v. Roberts*, 177 U. S. 496, 20 Sup. Ct. 713, 44 L. Ed. 861; *Holt v. Indiana Co.*, 80 Fed. 1, 25 C. C. A. 301; *Texas etc. R. R. Co. v. Bloom*, 60 Fed. 979, 9 C. C. A. 300; *Hubinger Co. v. Quincy etc. Ry. Co.*, 98 Fed. 897, 39 C. C. A. 336; *Davis v. Burke*, 97 Fed. 501, 38 C. C. A. 299. As we feel that we are in any event controlled by the decision in the *Dastervignes* case, we do not think it necessary to state to what extent we have changed our views from our original holding in the light of a further examination of the question and the fuller discussion afforded us upon the re-argument.

Judgment will be entered affirming the judgment entered in the lower court in favor of the United States.

Davis, J., and Doan, J., concur.

[Civil No. 826. Filed March 26, 1904.]

[76 Pac. 639.]

UNITED STATES OF AMERICA, Plaintiff and Appellant,
v. GIN HING, Defendant and Appellee.

1. **ALIENS—CHINESE EXCLUSION ACTS—PRIVILEGED PERSONS—CERTIFICATES—MERCHANTS—SALESMAN IS NOT—TREATY OF NOVEMBER 17, 1880 (22 STATS. 826), TREATY OF MARCH 26, 1894 (28 STATS. 1210), ACT OF CONGRESS OF JULY 5, 1884, c. 220, 23 STATS. 115 (U. S. COMP. STATS. 1901, P. 1305), AND ACT OF CONGRESS OF NOVEMBER 3, 1893, c. 14, SEC. 2, 28 STATS. 8 (U. S. COMP. STATS. 1901, P. 1323), CONSTRUED.**—Under the treaties, *supra*, providing that Chinese persons entitled to come into the United States when provided with the certificate prescribed by act of Congress of July 5, 1884, *supra*, are Chinese subjects, being officials, teachers, students, merchants, or travelers for curiosity or pleasure, and under act of Congress of November 3, 1893, *supra*, defining the term "merchant," as used in the exclusion acts, to be a person engaged in buying and selling merchandise at a fixed place of business, which business is conducted in his name, and who does not engage in manual labor, except in the conduct of said business, a person described in his certificate as a "salesman" is not described as a merchant within the generally accepted meaning of the word or within the statutory meaning thereof.
2. **SAME—SAME—CERTIFICATES—MUST CONFORM STRICTLY TO REQUIREMENTS OF EXCLUSION ACT—ACT OF CONGRESS OF JULY 5, 1884, c. 220, 23 STATS. 115 (U. S. COMP. STATS. 1901, P. 1305), CITED.**—The provisions of the act, *supra*, requiring Chinese persons to procure certificates, stating certain facts, must be strictly complied with in order that the certificate may be of value to the person holding the same to establish his right to come or remain within the United States.
3. **SAME—SAME—SAME—SAME—MERCHANT—CERTIFICATE MUST CONTAIN WHAT—ACT OF CONGRESS OF MAY 6, 1882, c. 126, 22 STATS. 58 (U. S. COMP. STATS. 1901, P. 1305), AND ACT OF CONGRESS, JULY 5, 1884, c. 220, 23 STATS. 315, 1 SUPP. REV. STATS. U. S. 458 (U. S. COMP. STATS. 1901, P. 1305), CONSTRUED.**—Under the act of May 6, 1882, *supra*, it was not required that the certificate should state that "such person is entitled by this act to come within the United States," nor did it require that a *merchant's* certificate should state "the nature, character and estimated value of the business carried on by him." By the act of July 5, 1884, *supra*, these requirements were added to those then existing, and a certificate which fails to contain them is defective and affords to the holder thereof no right to enter or to remain within the United States.

4. SAME—SAME—SAME—EVIDENCE—CERTIFICATE SOLE EVIDENCE OF RIGHT—ACT OF CONGRESS OF JULY 5, 1884, c. 220, 23 STATS. 115 (U. S. COMP. STATS. 1901, P. 1305), CONSTRUED.—Under the act of July 5, 1884, *supra*, providing that the certificate shall be the sole evidence permissible on the part of the person producing the same to establish a right of entry into the United States, it is error for the court to receive evidence *aliunde* that a Chinese person, whose certificate states his occupation as “salesman” is in fact a merchant, and hence a member of a privileged class.
5. SAME—SAME—SAME—SAME—SAME—EVEN IF PERMITTED TO ENTER BY COLLECTOR OF CUSTOMS.—The certificate being the sole evidence permissible to establish a right of entry into the United States, and being required to be produced whenever lawfully demanded, and the act further providing that “any person found unlawfully within the United States shall be caused to be removed therefrom,” the fact that the defendant has already been permitted to enter and is now within the country does not alter the rule, and no evidence *aliunde* is admissible to show that the holder is in fact a member of a privileged class.

APPEAL from a judgment of the District Court of the First Judicial District. George R. Davis, Judge. Reversed.

The facts are stated in the opinion.

Frederick S. Nave, United States Attorney, and John H. Campbell, Assistant United States Attorney, for Appellant.

No appearance for Appellee.

KENT, C. J.—Gin Hing, a Chinese person, was ordered by a United States commissioner to be deported to China. An appeal was taken from the order, and a trial thereunder had in the court below. Gin Hing, the defendant, the appellee in this court, offered in evidence in the court below, as proof of his right to enter and to be in the United States, a certificate issued at Hong Kong, the last place of his residence before coming to this country, under the provisions of the Chinese Exclusion Act. The certificate so offered stated that the former occupation of the defendant was a grocer in Sun Wing; that his present occupation, which he had pursued for thirteen months, was that of a salesman in a certain medicine shop in Hong Kong, and the certificate stated that he was going to San Francisco to take the place of his brother

in a medicine shop in that city. The United States, the plaintiff, objected to the introduction of this certificate, on the ground that it was defective and invalid, and not in the form required by law, and that it showed on its face that the defendant is such a person as is not permitted by law to come to the United States or remain therein. The court overruled the objection and received the certificate in evidence. Thereupon the defendant offered to show, by further testimony of the defendant, that he for many years prior to his coming to the United States had been, and at the time of his so coming was, and ever since had been, a merchant, to which offer the district attorney objected, upon the ground that such testimony was incompetent, irrelevant, and immaterial, because the certificate constitutes the sole evidence of the defendant's right to be in the United States; the facts in the certificate not being controverted by the plaintiff. The objection to the introduction of such testimony being overruled by the court, and the plaintiff having duly excepted thereto, the plaintiff then admitted the fact to be that the defendant was then, and at the time of his coming to the United States and for many years prior thereto had been, a merchant. The court thereupon gave judgment that the defendant is a merchant, that he is entitled to remain in the United States, and that he be discharged. From this judgment the plaintiff appeals to this court.

The appeal in this case presents two questions for our consideration: First, whether the certificate offered in evidence by the defendant was sufficient to show that the defendant was one of the privileged classes entitled to enter and remain in the United States; and, second, whether evidence on the part of the defendant, other than the certificate, was properly admissible to establish that fact.

By act of July 5, 1884, c. 220 (23 Stats. 115, 1 Supp. Rev. Stats. U. S. 458 [U. S. Comp. Stats. 1901, p. 1305]), Congress enacted that every Chinese person other than a laborer, who may be entitled by the treaty of November 17, 1880, (22 Stats. 826,) or the act itself, to come within the United States, and who shall be about to come to the United States, shall procure a certificate, issued as therein provided, which certificate shall state among other things such person's present occupation or profession, that he is entitled by the said act to come within

the United States, and, if the person shall be a merchant, the certificate shall state the nature, character, and estimated value of the business carried on by him prior to and at the time of his application. The act further provides that the certificate shall be the *prima facie* evidence of the facts set forth therein, and shall be produced to the collector of the port at which the person named therein shall arrive, and afterwards produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person producing the same to establish a right of entry into the United States; but said certificate may be controverted, and the facts therein stated disproved, by the United States authorities. The Chinese persons entitled by law to come to the United States and reside therein, when provided with such certificates, are Chinese subjects, being officials, teachers, students, merchants, or travelers for curiosity or pleasure. Treaty of November 17, 1880, (22 Stats. 826); Treaty of March 17, 1894, (28 Stats. 1210); *Wan Shing v. United States*, 140 U. S. 424, 11 Sup. Ct. 729, 35 L. Ed. 503.

The facts set forth in the certificate in this case clearly show that the defendant was not entitled to admission to the United States as either an official, teacher, student, or traveler for curiosity or pleasure; and, unless the word "salesman" can be construed to mean "merchant," the defendant, under this certificate, is not within any of the classes of persons entitled by law to admission to the United States. The Standard Dictionary defines a salesman as "a man who sells goods in a shop or store or by canvassing." The word is generally accepted to mean a person who sells goods for a merchant, and not to mean the merchant himself. Congress, however, has defined the word as used in the Chinese Exclusion Act as follows: "A merchant is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business." Act November 3, 1893, c. 14, sec. 2 (28 Stats. 8, 2 Supp. Rev. Stats. U. S. 154 [U. S. Comp. Stats. 1901, p. 1323]). We are of the opinion that a person described in the certificate required as a salesman

is not described as a merchant within the generally accepted meaning of the word, or within the statutory definition thereof. *United States v. Pin Kwan*, 100 Fed. 609, 40 C. C. A. 618; *Lew Jim v. United States*, 66 Fed. 953, 14 C. C. A. 281; *Lai Moy v. United States*, 66 Fed. 955, 14 C. C. A. 283.

The certificate further fails to comply with the requirements of the act, in that it does not contain a statement that the defendant is entitled to come within the United States, nor does it contain a statement, as required of one claiming the privilege as a merchant, showing the estimated value of the business carried on by him. It has been held by the courts, wherever these provisions of the statute have been under consideration, that these requirements must be strictly complied with in order that the certificate may be of value to the person holding the same to establish his right to come to or remain within the United States. *United States v. Yong Yew* (D. C.), 83 Fed. 832; *United States v. Chu Chee*, 93 Fed. 797, 35 C. C. A. 613. From an examination of the statutes it is evident that Congress deemed these requirements necessary in aid of the purposes sought to be accomplished by the Chinese Exclusion Act. Under act of May 6, 1882, c. 126 (22 Stats. 58 [U. S. Comp. Stats. 1901, p. 1305]), it was not required that the certificate should state that "such person is entitled by this act to come within the United States," nor did it require that a merchant's certificate should state "the nature, character and estimated value of the business carried on by him." By act of July 5, 1884, c. 220 (23 Stats. 315, 1 Supp. Rev. Stats. U. S. 458 [U. S. Comp. Stats. 1901, p. 1305]), amending the former act, these requirements were added to the then existing requirements of the certificate. The fact that these requirements were added shows that in the opinion of Congress they were necessary, and it is not the province of the courts to express an opinion as to the wisdom or necessity thereof, or to render the requirements nugatory by holding that a person who produces a certificate which fails to contain them sufficiently complies with the statute to be entitled to entry into the United States. We think that the certificate is defective, and affords to the defendant no right to enter or to remain within the United States.

We think the trial court was in error in allowing the defendant to establish by evidence other than the certificate that

he was in fact a merchant, and thus was in fact within one of the classes privileged to admission to this country. The act itself provides that the certificate "shall be the sole evidence permissible on the part of the person producing the same to establish a right of entry into the United States." This provision is express and explicit. It affords the defendant no means of proof of his right to land, other than the certificate. *Wan Shing v. United States*, 140 U. S. 424, 11 Sup. Ct. 729, 35 L. Ed. 503.

The fact that the defendant has already been permitted to enter, and is now within the country, cannot alter the rule with respect to the admission of proof of his right to be here. The statute provides not only for the production of the certificate to the collector of customs at the port of entry, but for its production afterwards whenever lawfully demanded, and further provides that "any Chinese person found unlawfully within the United States shall be caused to be removed therefrom." Such a person can lawfully enter only by means of a proper certificate. If he has entered without such proper certificate, either with or without the sanction of the collector of the port, he is unlawfully within the United States. If his entry was unlawful, his residence here is equally so. Therefore, whether the case to be determined is one of his right to enter or his right to remain, the only question to be determined is whether the person is a person entitled to enter. Of this the statute makes the certificate, unless the same be controverted, the only proof admissible. *United States v. Chu Chee*, 93 Fed. 797, 35 C. C. A. 613; *United States v. Pin Kwan*, 100 Fed. 609, 40 C. C. A. 618; *Mar Bing Guey v. United States* (D. C.), 97 Fed. 576; *Li Sing v. United States*, 180 U. S. 496, 21 Sup. Ct. 449, 45 L. Ed. 634.

We think, therefore, that it was error for the trial court to enter judgment discharging the defendant, but that he was not entitled to remain in the United States, and should have been deported. The judgment of the district court is reversed, with instructions to that court to enter judgment in conformity with this opinion.

Sloan, J., and Doan, J., concur.

[Civil No. 835. Filed March 26, 1904.]

[76 Pac. 614.]

P. C. ROBERTSON, Probate Judge and Ex-officio Trustee of North Globe Townsite, Defendant and Appellant, v. SARAH S. MARTIN, Plaintiff and Appellee.

1. PUBLIC LANDS — TOWNSITES — TRUSTEE—OCCUPANTS—CLAIMANTS—TOWN LOTS—PURCHASE PRICE—REV. STATS. U. S., SEC. 2387 (U. S. COMP. STATS. 1901, P. 1457), CITED—REV. STATS. ARIZ. 1901, PARS. 4075, 4076, 4077, 4079, 4080, 4085, 4093, 4094, CONSTRUED.—Section 2387, *supra*, provides that the judge of the county court may enter at the proper land-office land occupied as a townsite of an unincorporated town, in trust for the "occupants" thereof, leaving the execution of the trust to such regulation as may be prescribed by the legislature of the state or territory. Paragraphs 4075, 4076, 4077, 4079, 4080, 4085, 4093, and 4094, which provide the method of executing the trust, and require the payment by the "claimant" to the trustee of the purchase price of five dollars per lot before he is entitled to a deed, do not distinguish between "occupants" and "claimants." Payment by both actual occupants and those who merely claim the right to possession is requisite under the statute. An occupant, to be entitled to his deed, must be a claimant, file his statement, and pay to the trustee the purchase price.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Gila. Fletcher M. Doan, Judge. Reversed.

The facts are stated in the opinion.

Peter T. Robertson, for Appellant.

J. S. Sniffen, and A. R. Edwards, for Appellee.

DAVIS, J.—The appellant, as the probate judge of Gila County, Arizona, duly entered at the proper land-office, and on September 9, 1901, received a patent for, the North Globe townsite, in trust for the use and benefit of the occupants thereof, in accordance with the act of Congress relating to the entry and patenting of townsites on public lands of the United States. The appellee, Sarah S. Martin, for some time prior thereto had been in the actual possession of about three and one fourth acres of land included within the area of

said townsite, and was one of the occupants for whose use and benefit the entry thereof was made. She was the owner of the undivided four-fifths interest in the possessory right to said tract of land. By the survey and plat of the townsite which was subsequently made, this tract, which was in a compact form, was subdivided into forty-six lots. The appellee made application to appellant, as the trustee of said townsite, for a deed to the undivided four-fifths interest in the aforesaid parcel of land, and in connection therewith made a tender of the sum of twenty-eight dollars, which she claimed to be her *pro rata* of the actual cost and expense incident to the securing of the patent, together with a further sum for the cost of making and acknowledging the deed. The trustee contended that he was required to receive from the appellee a purchase price at the rate of five dollars per lot, and refused to execute a deed, except upon payment by her of the sum of one hundred and eighty-four dollars, being four fifths of five dollars for each of the forty-six lots into which said parcel of land had been subdivided. This amount was subsequently paid by the appellee under protest, whereupon the trustee executed to her a deed for the lots referred to. She then commenced this action in the district court of Gila County to recover from the trustee the sum of one hundred and fifty-six dollars as an overpayment which was exacted from her without authority of law. On the trial of the cause in the court below there was no controversy as to the material facts, and it was stipulated "that the only question to be determined by the court is one of law; that the contention on behalf of the plaintiff is that the defendant was without authority of law in demanding of and from the plaintiff five dollars per lot as the purchase price thereof before making and delivering to the plaintiff her deed to the property mentioned in the complaint; that the defendant contends that he acted in accordance with law in making such demand, and that he had no authority of law for making and delivering to plaintiff a deed without first requiring of and from plaintiff five dollars per lot." Upon the single proposition thus involved, the court held in favor of the appellee, and rendered judgment against the trustee, from which the latter now appeals.

The question which the record presents for our consideration is the same which was before the lower court, viz.: Did

the law warrant the trustee in requiring payment by the appellee of a purchase price at the rate of five dollars per lot for land of which she was an occupant at the entry of the townsite? The act of Congress under which this townsite was entered provides as follows: "Whenever any portion of the public lands have been or may be settled upon and occupied as a townsite, not subject to entry under the agricultural pre-emption laws, it is lawful, in case such town be incorporated, for the corporate authorities thereof, and, if not incorporated, for the judge of the county court for the county in which such town is situated, to enter at the proper land-office, and at the minimum price, the land so settled and occupied in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the state or territory in which the same may be situated." Rev. Stats. U. S., sec. 2387 [U. S. Comp. Stats. 1901, p. 1457]. It is further provided by section 2391 [U. S. Comp. Stats. 1901, p. 1459] that "any act of the trustees not made in conformity to the regulations alluded to in section 2387 shall be void."

The supreme court of the United States, in *Ashby v. Hall*, 119 U. S. 526, 7 Sup. Ct. 308, 30 L. Ed. 469, discussing the provisions of this act, said: "As thus seen, the act required the entry of land settled upon and occupied to be in trust 'for the several use and benefit of the occupants thereof according to their respective interests.' . . . The power vested in the legislature of the territory, in the execution of the trust upon which the entry was made, was confined to regulations for the disposal of the lots and the proceeds of the sales. These regulations might extend to provisions for the ascertainment of the nature and extent of the occupancy of different claimants of lots, and the execution and delivery to those found to be occupants in good faith of some official recognition of title in the nature of a conveyance. But they could not authorize any diminution of the rights of the occupants, when the extent of their occupancy was established." The supreme court of Colorado, in the case of *City of Denver v. Kent*, 1 Colo. 336, referring to the same act, said: "The power of the cor-

porate authorities is limited to the act of entry, and, when the land is entered, the party or parties so entering it become invested with a trust, the execution of which is under the sole and exclusive direction of the local legislature. Until the legislature points out the method and prescribes the rules of procedure, the trustees are wholly incapable of conveying the legal title to the beneficiaries of the trust, or of disposing of the land for any purpose or to any person. . . . The trust is manifestly a double one,—the first, a trust for the inhabitants of the town and as individuals; the other, a trust for them collectively and as a community. . . . This whole matter is left to the local legislature. To it belongs the creation of the tribunal before whom individual rights shall be defended. It prescribes the kind of evidence necessary to make good a claim of title. It prescribes what kind of disposition shall be made of the money arising from the sale of lots, and, in fact, has full and plenary power over the whole subject-matter of the trust. And, to strengthen this power conferred by Congress, the law declares any act done by a trustee, inconsistent with or in violation of the rules and regulations prescribed by the legislature for the execution of the trust, shall be void and of no effect. Congress seems to have contented itself with declaring simply who might enter the land and denominating the *cestui que trust*. All else it hands over to the territorial legislature, which is better fitted, on account of its proximity to the subject-matter of the trust, to supervise and direct its details.” Our own supreme court, in the case of *Singer Manufacturing Company v. Tillman*, 3 Ariz. 122, 21 Pac. 818, has held that “an ‘occupant,’ within the meaning of the townsite law of Congress, is one who is a settler or resident of the town, and in the *bona fide*, actual possession of the lot at the time the entry is made.”

The statutes enacted by the territory of Arizona in aid of the trust, and to carry the same into effect, include the following provisions, contained in the Revised Statutes of 1901:

“Par. 4075. Within three months after the entry of the townsite [the trustee, if it has not already been done, shall cause the townsite] to be surveyed into blocks, lots, streets and alleys and a plat thereof made, which shall conform as near as may be to the existing rights and claims of the occupants. The plat shall be submitted to and approved by the

board of supervisors of the county in which the townsite is situated and then recorded in the office of its county recorder, and thereafter the streets and alleys designated in said plat shall remain dedicated to the public use forever.

"Par. 4076. Immediately after the survey and plat has been made, or if a survey and plat has been made previous to the entry, then immediately after the entry of the land, the trustees shall cause a notice to be published in all the newspapers published in the town, or if none is published in the town, then by posting such notice in five of the most public places in the town for sixty days successively, giving notice of the entry of the land and requiring every claimant of any lot to file a statement of his claim in the office of the trustee on or before a specified day, which day shall be ninety days from the first publication.

"Par. 4077. Such statement shall be in writing, signed and sworn to by the claimant, or in case of his absence from the county, then by his agent or attorney and shall be recorded at length in a well-bound book to be provided and kept for that purpose by the trustee; the statement shall specify the grounds of the claim, particularly describe the lots claimed, the date and name, as near as may be, of the first actual occupant, what improvements have been made thereon, and at the time of making such statement the lots are actually possessed and occupied by the claimant or that the right to such possession and occupation is in him, if the same is occupied by another, and with such statement shall pay to the trustee the purchase price and fees hereinafter fixed and the trustee must not receive such statement unless the price and fees accompany it."

"Par. 4079. The number of lots which any one claimant shall be entitled to pre-empt under this act shall not exceed in the aggregate twelve thousand and five hundred square feet and such additional lots not exceeding three thousand one hundred and twenty-five feet to the lot, upon which the claimant shall have substantial improvements of the value of not less than one hundred dollars. When any claimant shall make application to enter more than four lots, he shall specially designate such lots in the statement to be filed by him as aforesaid and particularly describe the nature and value of the improvements on each of said additional lots and

shall at the time of making the proof required in section six of this act and in addition thereto, prove to the satisfaction of the trustee, by the affidavit of one or more reliable witnesses, the facts entitling him to enter such additional lots.

"Par. 4080. Immediately after the expiration of the ninety days for filing statements, the trustee shall proceed to hear the proofs (where no adverse claims have been filed) as near as can be in the order in which the claims have been filed, of such claimants as shall appear and offer to make their proof, and if the proof complies with the provisions of this act the trustee shall enter a decision to that effect and shall execute a good and sufficient deed to such lots to the claimant."

"Par. 4085. Each claimant or contestant shall, with his statement or contest, pay the trustee the sum of five dollars for each lot claimed not exceeding three thousand one hundred and twenty-five square feet per lot, as the purchase price therefor, and such money shall be refunded to such claimant by the trustee if it shall be finally determined that the party is not entitled to a deed, first deducting any costs or fees that may be due from such party."

"Par. 4093. If the money paid to the trustee for the purchase of lots shall be insufficient to pay the money required to be raised and paid out by him, he shall sell at public auction so many of the remaining lots, the title to which still remains in the trustee, and which no claim or contest is pending, as is necessary to raise the amount required; first giving such notice of the sale as the sheriff gives upon the sale of real estate on execution: Provided, that the lots shall be sold separately and no lot shall be sold for less than ten dollars; the lots not to exceed three thousand one hundred and twenty-five square feet. If sufficient money shall not be raised in this way, the trustee shall make an assessment and levy a tax upon all the lots, the title to which does not remain in the trustee, according to the value of the lots and the improvements thereon, and such assessment and tax shall be a lien upon the lots so assessed until paid, and may be recovered by the trustee by an action in any court having jurisdiction of the amount of such tax against the party to whom the lot is assessed.

"Par. 4094. The lots undisposed of as aforesaid, the title to which remains in the trustee, shall be subject to entry and purchase from the trustee at the rate of ten dollars per lot."

It is the theory of counsel for the appellee that the legislature, in the foregoing provisions, has recognized and distinguished three separate classes of individuals,—namely, occupants, claimants, and contestants,—and that an occupant is one who owned and occupied a lot or parcel of land in the townsite at the time of the entry; a claimant, one who makes a claim to a lot after the issuance of the patent and the survey into blocks, lots, streets, and alleys, but who has never been an occupant of the townsite; a contestant, one who asserts an interest adverse to either occupant or claimant, and files his statement of contest with the trustee. Under this view, it is contended that paragraphs 4076, 4077, 4079, 4080, and 4085, *supra*, do not apply to occupants, but have application only to claimants and contestants. We do not believe that the provisions of the territorial law fairly justify this classification, or the construction which results therefrom. Considering that the trust was for “the use and benefit of the occupants,” and that these provisions were enacted solely to regulate the execution of the trust, “as to the disposal of the lots in such town, and the proceeds of the sales thereof,” we think it plain that the paragraphs referred to were intended to apply primarily to occupants. In our view, the law contemplates that an “occupant,” to be entitled to a deed, must become a “claimant,” and as such file his statement and pay to the trustee the purchase price, as required by paragraphs 4077 and 4085. This is but a reasonable regulation, in connection with the vesting of the legal title in the occupant. It is also consistent with other legislation of Congress relating to the disposal of townsite lots. Rev. Stats. U. S., sec. 2382 [U. S. Comp. Stats. 1901, p. 1455]. If paragraphs 4077 and 4085 do not apply to occupants, then there is no statutory regulation under which the trustee can convey lots to occupants, and consequently no way by which they could obtain title to their holdings; for, as said in *City of Denver v. Kent*, *supra*: “Until the legislature points out the method and prescribes the rules of procedure, the trustees are wholly incapable of conveying the legal title to the beneficiaries of the trust, or of disposing of the land for any purpose or to any person.” It certainly cannot be that the legislature has provided for the disposal of lots to all save the occupants. On the contrary, we think it has fully dealt with every feature

of the townsite trust, and clearly expressed a method whereby occupants can make proof of their rights and obtain their deeds.

The act of Congress refers to "lots." Counsel for appellant well suggests the question: How can there be lots, and how can lots be sold, until they are surveyed, measured, and platted? Obviously, there must of necessity be a survey of the entire townsite. The extent of each occupant's holding must be determined. Paragraph 4075 provides for such a survey, and contains the restriction that the same "shall conform as near as may be to the existing rights and claims of the occupants." It would be beyond the power of the legislature, as held in *Ashby v. Hall*, *supra*, to "authorize any diminution of the rights of the occupants, when the extent of their occupancy was established." But the legislature has not said that the occupant's possessions shall be changed in size or shape. It has not declared that a lot shall be square, oblong, triangular, or round. It has simply prescribed that the area of a lot shall not exceed three thousand one hundred and twenty-five square feet. The subdivision of the appellee's tract into lots on the townsite plat did not diminish her holdings nor interfere with any right which she had. The trustee's action in that regard, and also in requiring the payment by the appellee at the rate of five dollars per lot, for the forty-six lots, was strictly in accordance with the statute.

It follows that the judgment must be reversed. The cause will be remanded, with directions that the district court enter a judgment in favor of the defendant.

Kent, C. J., and Sloan, J., concur.

[Civil No. 738. Filed March 26, 1904.]

[76 Pac. 598.]

MARTIN GOULD, Plaintiff and Appellant, v. THE MARICOPA CANAL COMPANY, a Corporation, Defendant and Appellee.

1. WATER AND WATER-RIGHTS—CORPORATIONS—CANAL COMPANY—ARTICLES—PURPOSE—PUBLIC AGENCY.—Where a corporation was organized "to carry on . . . the business of supplying a portion" of a

valley "with water for irrigation . . . and to this end and for this purpose to purchase, construct, build or dig such canals, ditches or flumes as may be necessary to convey water . . . to such point or points as may be necessary," its articles do not express that its purpose was to serve its shareholders as a carrier of water and not the public generally. A purpose to become a public agency might reasonably be inferred from the language used.

2. **SAME—CANAL—CARRIER—PUBLIC AGENCY.**—A corporation was organized in 1875 to carry on and conduct the business of supplying a portion of Salt River Valley with water for irrigation purposes. From the date of its organization until 1880 it supplied any and all landowners under the flow of its canal who applied for such service, indiscriminately. The incorporators of the company, as well as later stockholders, regarded the ownership of a share of stock as carrying with it the right to have delivered, upon any lands the owner might designate from year to year, water sufficient to irrigate one hundred and sixty acres of land. After 1880 and until 1885 the company distinguished between its shareholders and other consumers of water in fixing its rates of toll for service. Subsequent to 1885 the company furnished water to its shareholders and to the lessees of shares of stock, whether appropriators or not, upon any land or lands which such shareholders or lessees might designate, and declined to furnish water to persons not shareholders or the lessees of so-called water-right deeds. *Held*, that the corporation from the time of its organization has been a public agency as a carrier of water.
3. **SAME—WATER—PUBLIC—FLOWING IN CANAL OF CARRIER—SUBJECT TO APPROPRIATION.**—Water diverted and carried in the canal of a corporation acting as a public agency as a carrier of water is public property until actually used by appropriators, and is subject to appropriation to the same extent and in the same manner as when it flowed in the channel of the river.
4. **SAME—APPROPRIATION—WHAT CONSTITUTES—OWNERSHIP OF MEANS OF DIVERSION—UNNECESSARY.**—Under the Arizona statutes, an appropriator of water for irrigation is one who makes an application of public water on land he owns or possesses. To perfect such an appropriation two things are essential—the ownership or possession of land, and the application thereon of public water to a beneficial use. No statute, either territorial or congressional, makes the ownership of the means of diversion essential to perfect the right of appropriation.
5. **SAME—CANAL COMPANY—NOT OWNER OR POSSESSOR OF LAND—NOT APPROPRIATOR.**—A canal company organized for the purpose of the diversion and carriage of water for irrigation, and not being the owner of arable and irrigable land, is not an appropriator of water even though it does divert and carry water.

6. **SAME—APPROPRIATORS—WHO ARE—PRIORITY.**—Where a company not the owner of arable and irrigable land was organized for the purpose of the diversion and carriage of water for irrigation, all persons owning lands under the flow of its canal, which have been irrigated by means of water furnished by such canal, become appropriators and possessed of rights of appropriation in the order of their priority.
7. **SAME—APPROPRIATION—ABANDONMENT—WHAT CONSTITUTES.**—Abandonment of the right to water gained by appropriation is a matter of intent as such intent may be evidenced by the declaration of the party or as may be fairly inferred from his acts.
8. **SAME—SAME—HOW LOST.**—The right of appropriation may be lost by abandonment, or it may be lost to another by adverse user on the part of the other, continued for the period of the statute of limitations, and in no other way.
9. **SAME—SAME—ABANDONMENT—DISCONTINUANCE OF USE OF CERTAIN DITCH—DOES NOT NECESSARILY CONSTITUTE.**—The discontinuance of the use of a ditch rendered useless as a carrier of water by reason of increased diversions from the stream does not constitute an abandonment of the right of appropriation by an appropriator of water for purposes of irrigation, where it appears that he thereafter continued the use of water by means of another ditch.
10. **SAME—CORPORATIONS—CANAL COMPANY—CONTRACT FOR SERVICE OF WATER.**—Where a canal company, organized to divert and carry water as a carrier of public water for irrigation, required a user of water, at the beginning of each irrigating season, and as a condition upon which he could receive water, to sign a contract stipulating, in effect, that his use of water from the company's canal for such season should give him no right or claim to the use of water for the future, and that he waived thereby any and all right which he might have by virtue of any statute, custom, or law, to the use of water from the canal after the expiration of the period of time limited by the contract,—such contract is of no effect in lessening the liability of the canal company or the rights of the user as an appropriator of water.
11. **SAME—WATER-RIGHTS—CORPORATIONS—CANAL COMPANY—QUASI-PUBLIC SERVANT—DUTY—SERVICE.**—A canal company diverting water from a stream for the purpose of supplying owners and possessors of arable and irrigable land is a quasi-public servant; and to the extent that it has diverted and carried water from a stream, and to the extent to which the water has been applied by appropriators for the necessary irrigation of their lands, may not arbitrarily discontinue its service in whole or in part, but must continue this service so long as it is required by said appropriators and the water is available from the common source.

12. SAME—CANAL COMPANIES—CONTRACTS TO FURNISH WATER.—If applications for water be made during any season to a canal company acting as a carrier in excess of the capacity of the canal the company has the right and it is its duty to limit the contracts for the season to its capacity and to those appropriators possessing the older rights of appropriation.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Reversed.

On rehearing. Memorandum decision, *ante*, p. 111.

Docketed and dismissed with costs. 195 U. S. 639, 49 L. Ed. 356.

The facts are stated in the opinion.

W. H. Stilwell, and Joseph H. Kibbey, for Appellant.

It clearly appears that water diverted from the Salt River through the Wilson Ditch was first applied to reclamation of appellant's land in 1873, and later and "for over ten years last past" the water has been applied through the canal of appellee. The fact that appellant submitted to the illegal management of the canal of appellee does not change the legal status of appellant. The facts are not disputed, and the conclusion in law is irresistible that appellant is an appropriator of water from the Salt River: first by means of the Wilson Ditch, and afterwards, and now, through the Maricopa Canal, acting, as it is, in law, as the agent of the appropriator. *Farmers' High Line Canal etc. Co. v. Southworth*, 13 Colo. 111, 21 Pac. 1028, 4 L. R. A. 767; *Wheeler v. Northern Colorado Irr. Co.*, 10 Colo. 582, 3 Am. St. Rep. 603, 17 Pac. 487; *Albuquerque Land and Irr. Co. v. Gutierrez*, 10 N. Mex. 177, 61 Pac. 357; *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 31 Am. St. Rep. 275, 28 Pac. 966; *Broder v. Water Co.*, 101 U. S. 274, 25 L. Ed. 790; *Armstrong v. Larimer County Ditch Co.*, 1 Colo. App. 49, 27 Pac. 235; *Golden Canal Co. v. Bright*, 8 Colo. 144, 6 Pac. 142; *San Diego etc. Co. v. Sharp*, 97 Fed. 394, 38 C. C. A. 220; *Wright v. Platte Valley Irr. Co.*, 27 Colo. 322, 61 Pac. 603; *Mandell v. San Diego etc. Co.*, 89 Fed. 295; *South Boulder and R. C. D. Co. v. Marfell*, 15 Colo. 302, 25 Pac. 504; *Paige v. Rocky Ford Canal and Irr. Co.*, 83 Cal.

84, 21 Pac. 1102, 23 Pac. 875; *Curtis v. Le Grande Water Co.*, 20 Or. 34, 23 Pac. 808, 25 Pac. 378, 10 L. R. A. 484.

C. F. Ainsworth, for Appellee.

Appellant has lost by abandonment any rights of appropriation he may ever have had. According to the authorities, any right that he may originally have had must be considered as abandoned after this lapse of time, and certainly that is the reason of the matter, for it is now many years since any water has been obtained under the old ditch, and during all that time the appellant has been buying water through the appellee's canal on water-rights rented by him. *Churchill v. Bauman*, 104 Cal. 369, 36 Pac. 93, 38 Pac. 43; *Dalton v. Rentaria*, 2 Ariz. 275, 15 Pac. 37; *Oppenlander v. Left-Hand Ditch Co.*, 18 Colo. 142, 31 Pac. 855; *Davis v. Gale*, 32 Cal. 27, 91 Am. Dec. 554; *Hewitt v. Story*, 51 Fed. Rep. 101.

Therefore as to this question, Is the appellant entitled to water as a prior appropriator? we see that, as a matter of fact, the appellee is a prior appropriator of all the water that it carries, that, if the appellant or his predecessors in interest ever appropriated any water, which water was taken from him, it was not so taken from him by means of the appellee's canal at all, or certainly, if at all, only in part, and appellee should not be compelled to furnish to him all that was taken, and that the authorities are clear that as the appellant has for many years acquiesced in the rights of the appellee and bought water from it by virtue of water-rights which he had bought or leased, he has abandoned whatever rights he may ever have had, and now has no rights whatever as an appropriator.

Appellee is not bound to deliver water to appellant as claimed by him because he is cultivating lands cultivated earlier than those of water-right owners and lessors. We now come to what we consider really the most important question involved in this case.

This is the question whether the appellee is bound to deliver water to the appellant because he is cultivating lands cultivated earlier than those of some of the lessees of the appellant's water-right owners, notwithstanding that all of the water carried by the appellant is actually being put to a beneficial use by such water-right owners and lessees.

We shall follow out the principle on which the doctrine of appropriation of water and owning of water-rights is based, citing the authorities on the subject, and showing that water-rights need not be inseparably attached to land, that, on the contrary, they are the subject of property and may be bought and leased, and that the right and duty of the canal company is to furnish water to the owners or lessees of water-rights prior to those not owning or leasing water-rights, no matter on what land the water is to be used, provided all its water is actually put to a beneficial use.

The primary reason lying at the foundation of the whole system of the law of water-rights as built up in the arid region of the United States is that the development of the country is first to be considered, or, as the maxim puts it, "The greatest good to the greatest number." The old doctrine of riparian rights would have been injurious in application, as the water was needed to be carried from the streams for use in mining and irrigating the desert lands. Therefore by the application of the principle "the greatest good to the greatest number" the doctrine of allowing the diversion of water for irrigation and other beneficial purposes grew up. Black's Pomeroy on Waters, par. 14.

The next reason that it was found necessary to apply was *qui prior est tempore potior est in jure*, he who was the first appropriator was maintained in his right, for there would have been no stability to the law if an appropriation had not given a fixed legal right. *Id.*

Having this rule of prior appropriation fixed, the courts looked around for the principles which should govern cases which arose under it; when an appropriation should be recognized, and how the water should be used. Two rules were applied, and these two rules have governed the decision of all well-considered cases on this subject. These rules were (1) that of "beneficial use"; an appropriation could not be made except for a beneficial use, an appropriation not for a beneficial use would not have aided the development of the country; (2) that the possessor of prior rights must so use his rights as not to injure others, or, as the old maxim of the law puts it, *sic utere tuo ut alienum non laedas*.

These simple rules and principles should govern all cases involving water-rights; and we will trace their growth through

the authorities and show how the law has been developed into the principles maintained by the appellee in the present case.

We start with the doctrine of the right of the prior appropriator, and we shall point out how the authorities have reasoned in accordance with the principles above set forth: (a) That an appropriator can change the point of diversion of his water; (b) that an appropriator can change the use to which he puts his water; (c) that an appropriator can sell his water-right and the right will attach to the vendee (not the vendee's land); (d) that a water-right is property and not appurtenant to land unless expressly so made, and that an appropriator can lease his water-right and the water can then be used by the lessee. And, to sum up, that a water-right is property and that a water-right owner or his assignee is entitled to his property in the water, so long as it is actually and beneficially used, before outsiders can have any claim.

(a) Point of diversion can be changed. Soon after the doctrine of prior appropriation had been settled the question arose whether one who had acquired the prior right could not change the point from which he diverted his water if he chose and take the same amount from some other part of the stream. This contention was combated, but the courts held that if the waters were to be applied to a beneficial use, and if by change of the point of diversion no injury was done to the rights of others which had vested since the first appropriation, then there was no reason why the point of diversion should not be changed, and held that it could be. *Ramelli v. Irish*, 96 Cal. 214, 31 Pac. 41. " . . . it is also settled law that the person entitled to the use of the water may change the place of diversion, or the use to which it was first applied, if others are not injured by such change."

Other cases to the same point are: *Kidd v. Laird*, 15 Cal. 161, 76 Am. Dec. 472; *Whittier v. Cocheco Mfg. Co.*, 9 N. H. 454, 32 Am. Dec. 382; *Davis v. Gale*, 32 Cal. 27, 91 Am. Dec. 554; *Gallagher v. Montecito Co.*, 101 Cal. 242, 35 Pac. 770; *Junkans v. Bergin*, 67 Cal. 267, 7 Pac. 684; *Correa v. Frietas*, 42 Cal. 339; *Fuller v. Swan Co.*, 12 Colo. 12, 19 Pac. 836; *San Luis Water Co. v. Estrada*, 117 Cal. 168, 48 Pac. 1075; *Mining Co. v. Mosgan*, 19 Cal. 609; *Maeris v. Bicknell*, 7 Cal. 262, 68 Am. Dec. 257; *Sieper v. Frink*, 7 Colo. 148, 2 Pac. 901.

This idea therefore that the point of diversion of the water could be changed at the will of the prior appropriator provided the water was still put to a beneficial use and that he did not injure others by making the change, became well established in the law, and along with it grew the idea that the (b) use of water can be changed. Following out the reason of the matter, that the right to water acquired by the prior appropriator was a property right belonging to him personally and not to his land, and could be used as he saw fit, provided he did not injure the public by wasting the water, or private individuals by direct harm to them, the courts held that the use to which the water had been first put might be abandoned by the appropriator and the water put to a new use. Kinney on Irrigation, p. 236.

"It will be seen upon examination that the authorities hold conclusively that in all cases the effect of the change upon the rights of others is the controlling consideration, and that in the absence of injurious consequences to others, any change which the party chooses to make is legal and proper, either as to the place of using the water or the use of the water. In fact this is also the common-law rule upon the subject. So if the original appropriation was made to run a saw-mill, the water may be used to run a grist-mill, for mining, irrigating or for some other useful purpose and the appropriator will lose no right that he may have acquired by virtue of his appropriation, so long as he injures the rights of no one else acquired prior to the change."

Other cases to the same effect are: *Ramelli v. Irish*, 96 Cal. 214, 31 Pac. 41; *Kidd v. Laird*, 15 Cal. 161, 76 Am. Dec. 472; *Maeris v. Bicknell*, 7 Cal. 262, 68 Am. Dec. 257; *Meagher v. Hardenbrook*, 11 Mont. 385, 28 Pac. 451; *Power v. Switzer*, 21 Mont. 523, 55 Pac. 35; *McDonald v. Bear River Co.*, 13 Cal. 220; *Davis v. Gale*, 32 Cal. 27, 91 Am. Dec. 554.

Now, having followed the reasoning of the court along thus far and having seen that the principles which govern the decision of these water-right cases are simply that the prior appropriator has the right to the water subject only to the proviso that he shall not injure the public by wasting it, or a private individual by violating any of his subsequently acquired rights, we can follow the decisions of the courts a step farther to the proposition that (c) a water-right may be sold

and its prior right be transferred. Cases arose in which the prior appropriator had sold his right to water to some one who was using the water; the right of the assignee was now contested by some third party, and so the court had to consider the validity of the assignment of the water-right.

In deciding this question they found that by holding the assignment valid the public was not injured because the water was actually used, so they held, that in case no individual who had acquired rights subsequently was injured, such a transfer was valid and vested the prior right in the assignee. Black's *Pomeroy on Waters*, par. 61 (citing *Strickler v. Colorado Springs*, 16 Colo. 61, 25 Am. St. Rep. 245, 21 Pac. 316).

"It is also held that the right acquired by a prior appropriator, to use the water of a stream for irrigation, is not inseparably connected with the land for the benefit of which the appropriation was made, but the right may be sold separate and apart from the land; for instance, it may be sold to a city for the use of its inhabitants. *Strickler v. Colorado Springs*, 16 Colo. 61, 25 Am. St. Rep. 245, 26 Pac. 313. In the case cited the court in Colorado derived this doctrine from the principle (now well settled by the judicial decisions in that and other states), that one who has acquired the right, by prior appropriation to divert the waters of a stream may change the place of diversion and also the place of use, according to his necessity or interest, provided only that such change involves no injurious consequences to the rights of others. . . . These principles being taken as established it follows as a logical necessity that the right to the use of the water for irrigation is a right not so inseparably connected with the land that it may not be separated therefrom. The right has been treated and held as a property right in numerous cases. (Quoting now from the Strickland decision.) The authorities seem to concur in the conclusion that the priority to the use of water is a property right. To limit its transfer would in many cases destroy much of its value. . . . In our opinion this right may be transferred by sale so long as the rights of others, as in this case, are not injuriously affected thereby. If the priority to the use of water for agricultural purposes is a right of property, then the right to sell it is as essential and sacred as the right to possess and use. What difference can it make to others whether the owner of the priority

in this case uses it upon his own land, or sells it to others to be used upon their lands? There can be no claim of waste. . . . At common law water-rights were declared to be the subject of sale, and although with us such rights are acquired by appropriation rather than by grant or prescription, as at common law, this certainly cannot affect the right of alienation. Citing Angell on Watercourses, c. 5; *Hurd v. Curtis*, 7 Met. 94; *DeWitt v. Harvey*, 4 Gray, 486. . . . There is no controversy in the present case in reference to the mode and manner in which the right to water may be conveyed, the contention extending further back; the claim being that the right cannot be conveyed at all, except with the land. The claim is not well founded. As we have seen, the right is the subject of property, and may be transferred accordingly; the sole limitation being that the rights of others shall not be injuriously affected by such transfer."

The water belongs to the first appropriator and he can use it as he sees fit or sell it to others to use. The only restriction placed upon him is that he must not injure others whose rights have already vested by his use, or injure the public by waste of the water without use. Kinney on Irrigation, p. 424.

"The exclusive right to divert and use the water of a natural stream acquired by a prior appropriator of the same is the subject of property and may be sold and conveyed." *Ortman v. Dixon*, 13 Cal. 33; *Fabian v. Collins*, 2 Mont. 510.

The recent case of *Milheiser v. Long*, 10 N. M. 99, 61 Pac. 111, recognizes the principle that a water-right may be sold and conveyed, saying: "That the use of water held by virtue of a valid prior appropriation is the subject of sale and conveyance is undoubtedly true." In that case, however, no valid appropriation had been made of the water, because while the water had been diverted it had never been put to a beneficial use. (d) Water-right is property, and not appurtenant to land unless expressly so made, and an appropriator can lease his water-right and the water can then be used by the lessee.

To sum up these authorities we come to the conclusion that the right to water gained by prior appropriation is a right attaching to the appropriator personally and for his benefit. It is a right in gross, so to speak. It is not a right that attaches only to one piece of land. It attaches to the person of the appropriator and for his benefit and profit. He can

use it in any way that he pleases and change the use at any time, provided that he does not injure the public by letting it be wasted or injure parties who have subsequently vested rights. The gist of the matter is that the prior appropriator can do with the right as will most profit him, provided the water is actually used beneficially. It is a property right. *Nichols v. McIntosh*, 19 Colo. 22, 34 Pac. 279.

"The law is well settled in this state that a person who has lawfully appropriated water to beneficial use may change the point of diversion without losing his right of priority. A change of water-way does not necessarily involve a change of water-rights. In acquiring a priority of right to the use of water for purposes of irrigation, the mode of diversion is unimportant; and such rights are entitled to be protected, irrespective of the mode of diversion. . . . The late Chief Justice Beck, speaking for the court, declared: 'Property rights in water are as important, as valuable, and as extensive as the broad acres to be fertilized thereby.' . . . Since that time this court has repeatedly held that priorities of right to the use of water are property rights. Such is the settled doctrine of this state." *Bloom v. West*, 3 Colo. App. 212, 32 Pac. 846.

"According to the recent legal decisions, a party who owns land, and the right to use water from an irrigating ditch or canal, has two separate and distinct rights of property, either of which could pass by assignment or conveyance, regardless of the other." See, also, the cases cited before.

Now it may be urged, though these cases do hold that a prior appropriator of water holds his right to the use of that water as his own property, and not as appurtenant to his land, and that he can sell or dispose of his right as he wishes, provided that the water is put to a beneficial use; still these cases were all cases where the very individual who had appropriated the water sold his right; whereas, in the case at bar there are intermediate parties between the appropriator and the grantee, the actual user of the water. The actual appropriator might, according to the authorities, have transferred his right to the party who now wants to use the water, but he did not; he transferred it to the corporation, which transferred it to one of its stockholders, who now leases it or sells it to the party who wants to use the water; and this is not lawful. Such a contention would be as absurd as was the

reasoning of the English courts, when they held, in order to evade the statute of uses, that that statute did not apply to a use limited on a use. Such a construction would be absurd, but it is the only difference between the cases cited and the present case. But such construction has not been upheld. In a recent Colorado case almost on all fours with the present case, the court gave the rational idea of the law. That was the case of *Larimer & Weld Co. v. Cache La Poudre Co.*, 8 Colo. App. 237, 45 Pac. 525.

In this case the facts were: (1) Some parties owned a ditch and prior rights to water as tenants in common and were consumers of the water thereby carried; (2) they organized a corporation to which they conveyed the ditch and water-rights, the company issuing to the several owners capital stock representing ownership in the ditch, and the quantity of water which they were entitled to use. There were twenty-four shares of stock so issued. (3) Of these twenty-four shares, another corporation, the defendant, long after the water had been beneficially used, bought three and one fourth shares from three of the water consumers and shareholders in the first water company. (4) This second company "stored the water thereby represented in its reservoir, and thence distributed it during the later irrigation season to its stockholders, who used it for irrigating lands belonging to them; and lying under their ditch. It will be seen that the water was thus severed from the land on which it was originally used, and applied for the purpose of irrigating other lands." The plaintiff company was a subsequent appropriator to the parties above mentioned, but now claimed that the defendant had no right to this water thus transferred to it by the first water company, (a) because the grantors of plaintiff had abandoned their rights, (b) because such company had no right to sell its water-rights.

The court below upheld these contentions, and plaintiff in error appealed. The appellate court reversed the lower court, saying in part: "The latter (the rights to water of the grantors of the plaintiff in error) had never been abandoned as alleged, and such fact was established by uncontradicted testimony; and, as shown by all the evidence upon that point, all the water drawn by the Dry Creek Ditch, during the irrigating season, was used upon the land under it, and at

times the supply was inadequate. It is true that all the water represented by the Alvord stock (Alvord was one of the grantors of plaintiff in error) was not used upon his land, but the evidence shows it, when not needed by him, to have been leased or let and used by others under his ownership and control. Such want of personal use, under numerous decisions, has been held not to impair his right of property. If Dry Creek Ditch was entitled to its priority, which is unquestioned, and Alvord was entitled to a given quantity of such priority, and such water was legitimately used upon the land under the ditch, whether applied in person, or rented to others was a question that could in no way affect the legal rights of defendant in error. It is now the settled law that water-rights, though primarily applied to a certain tract of land, may be severed from it, used on other land by the owner, or be sold to any consumer under the same ditch, or the ditch extended to apply the same water-right to other lands or uses, subject only to the limitation that the use and transfer shall not be injurious to a later appropriator. Consequently the diversion and new application of the water were questions in which the defendant in error had no concern, or legal right to interfere, unless clearly establishing the fact of the injury to its supply, which was not established. . . . We are clearly of the opinion that under the law and the evidence . . . the owner (of the stock) had full legal right to connect the Dry Creek Ditch with the reservoir, and carry all the water represented by the stock into it and from it, by any route available to carry it, and apply it to any land for the purpose of irrigation, and that the court erred in its decree." *Cache La Poudre Co. v. Larimer & Weld Co.*, 25 Colo. 144, 71 Am. St. Rep. 123, 53 Pac. 318.

This case was now appealed to the supreme court of Colorado, from the decision of the court of appeals, which is cited above, and the decision of the court of appeals was affirmed. The court said: "Notwithstanding the decision of this court in *Strickler v. Colorado Springs*, 16 Colo. 61, 25 Am. St. Rep. 245, 26 Pac. 313, that there may be a sale of a water-right, separate from the land, and an application of the water to other lands so long as the rights of others are not infringed, plaintiff persists, that its conclusion is unsound. . . . But not only in this state, but in all others in which the system of

appropriation prevails, the same result has been reached where the question has been raised. . . . The only question of importance then in this case is, Have the transfer of the priority and the change of the place of use injuriously affected the later appropriator? If not, plaintiff may not be heard to complain. . . . They (the prior appropriators) could not waste it (the water appropriated) or divert more than their necessities required; but junior appropriators are not concerned with the method of apportionment adopted by those entitled to its use, so long as the latter had a necessity for it, and actually used it, and diverted no more than the decreed priority. If one consumer did not need or use all that his stock entitled him to, or if, by sale of a portion of his lands, his necessity was less, or, as expressed by counsel, if he owned more water than land, he might lawfully sell the excess of water, or lease it, or permit his co-tenants to use it, before any subsequent appropriation attached thereto; and of this junior appropriators may not complain."

These Cache La Poudre cases which we have just cited decide the very proposition which we are now discussing: water-rights are property; they can be sold or leased, provided that the water is actually used, and so long as this is the case, outside parties have no right to complain.

Other cases to the same effect are the following (these cases are all quoted at length in appellant's brief in the case of *Salt River Valley Canal Co. v. Slosser*, No. 742.): *Wyatt v. Larimer & Weld Irr. Co.*, 1 Colo. App. 480, 29 Pac. 906; *Nevada Ditch Co. v. Bennett*, 30 Or. 59, 60 Am. St. Rep. 777, 45 Pac. 472; *Oppenlander v. Left Hand Ditch Co.*, 18 Colo. 142, 31 Pac. 854.

SLOAN, J.—A rehearing was granted in this case at the last term of the court. As no opinion was filed upon the first hearing, we deem it proper to state now, with some fullness, the facts and our holding on these facts. The Maricopa Canal Company was organized under the general incorporation act of the territory during the year 1875. Its purpose, as expressed in its articles, was the carrying on and conducting of the business of supplying a portion of the Salt River Valley with water for irrigation, milling, manufacturing, and mechanical purposes. Its capital stock was divided into fifty

shares, each of which was treated by the incorporation as carrying with it a water-right privilege in the canal sufficient for the irrigation of one hundred and sixty acres of land. Prior to 1880 the canal company supplied water indiscriminately to landowners under its canal who applied for the same and paid the yearly rental therefor. In 1880 the canal company, by resolution, adopted the policy of giving preference to its shareholders and renters of the same in its yearly contracts for supplying water and of disposing of any surplus remaining to landowners who were neither shareholders nor renters of the same. After 1885 water was supplied by the company to such landowners as were owners of shares of stock and lessees of the same for particular years. Prior to 1887 no attempt was made by the company to confine the water-rights represented by the shares of stock to particular tracts of land. During that year a resolution of the company provided that the water-rights might be segregated from the shares of stock and attached to particular tracts of land. Some of the shareholders complied with this resolution, but many did not. It has been the practice of the shareholders to rent to non-shareholders, during particular seasons, their shares of stock or portions of the same, and to give orders to their lessees upon the canal company for the delivery to such lessees of the water assumed to be represented by said shares of stock. This practice was recognized by the canal company and these orders were respected by it as entitling the holders to the same rights accorded to the owners thereof. In some instances the owners of these shares of stock did not own or possess lands, and the only use made by them of the water-right privileges, assumed to belong to said shares of stock, was to rent them to non-shareholders who were the owners or possessors of lands. Gould, the appellant, is the owner of lands under the flow of the canal owned by the appellee, which are described as the "north one half of the southwest one fourth, and the south one half of the northwest one fourth, of section fourteen, township one north, range three east, Maricopa County." The predecessors in interest of Gould began the irrigation of this land during the year 1869 by means of a ditch known as the "Wilson Ditch." They continued to obtain water by this means until the purchase of the land by Gould in 1888. Gould until 1891 irrigated the

land from the same ditch. The Wilson Ditch was abandoned in 1891 for the reason that the water formerly available to it was being diverted by the Maricopa Canal and other canals having their heads farther up the river. After 1891 and until 1899, during each year, Gould obtained water in amounts ranging from sixty to seventy miner's inches, for the irrigation of his lands from the Maricopa Canal by renting shares of stock from others, in accordance with the prevailing practice. At the beginning of each irrigating season the canal company, in accordance with its general policy and as a condition upon which he could receive water, required Gould to sign a contract stipulating, in effect, that his use of water from the company's canal for such season should give him no right or claim to the use of water in the future; and that he waived thereby any and all right or claim which he might have by virtue of any statute, custom, or law to the use of water from the canal after the expiration of the period of time limited by the contract. In 1899 Gould applied to the Maricopa Canal Company for water for the ensuing irrigating season to the amount of eighty miner's inches, and tendered for said amount the fixed charge established by the company for its service for said season. The canal company declined to furnish him water upon the ground that he was not the owner of a share of stock or water-right in the canal, or had not rented a share of stock or water-right from any owner thereof for the season for which he applied. Thereupon Gould brought suit against the company for the purpose of compelling the canal company to furnish the water for which he applied.

Upon these facts the trial court found that Gould, at the time he made application for water and was refused, was not entitled to water or to the service of the canal company for the following reasons: That Gould was not an appropriator of water from the Salt River; that the Maricopa Canal Company was organized for the purpose of supplying water for irrigation purposes to its own stockholders, and that all the water diverted and carried by said canal company in its canal belonged to and was the property of such stockholders and holders of its water-right deeds; that Gould was not a shareholder in the company, or the lessee of any share of stock, or the owner of any water-right deed issued by the company. Upon

the grounds mentioned the trial court declined to grant Gould any relief, and dismissed his complaint. The reasons that were given by the trial court for its action in dismissing the complaint present questions of vital importance to the appellee and other users of water in like situation. These will be considered with other questions necessarily involved in the issues.

The first and most important question is as to the *status* of the Maricopa Canal Company as a carrier of water. The finding of the court that the canal company, by its organization, limited its purpose and business to the supplying of water for irrigation to its own shareholders is not sustained by an inspection of its articles of incorporation nor by the history of the company. The purpose of the corporation, as expressed in its articles, was "to carry on and conduct the business of supplying a portion of the valley lying upon the north side of Salt River, county of Maricopa, territory of Arizona, in the vicinity of the town of Phoenix, with water for irrigation and for milling, manufacturing, and mechanical purposes, and to this end and for this purpose to purchase, construct, build, or dig such canals, ditches, or flumes as may be necessary to convey water from Salt River, . . . and conveying said water to such point or points in the above-described valley of Salt River as may be necessary for the disposal or use of said water." It will thus be seen that there is nothing in its articles of association which indicates that its purpose was to limit its service as a carrier of water to any particular lands, nor is it expressed that its purpose was to serve its shareholders, and not the public generally. Had the purpose of the company in its organization been to become a public agency as a carrier of water, such purpose might fairly and reasonably be inferred from the language used in the articles. The history of the company shows that from the date of its organization until 1880 it supplied any and all landowners under the flow of its canal indiscriminately who applied for such service. The organization of the company, therefor, and its early history do not sustain the holding that the company was organized for the sole purpose of serving its shareholders as the private agency of such shareholders. It is true that the incorporators of the company as well as later shareholders regarded the ownership of a share of stock as carrying with it the right to have deliv-

ered, upon any lands the owner might designate from year to year, water sufficient for the irrigation of one hundred and sixty acres of land. It is also true that after 1880 and until 1885 the canal company distinguished between its shareholders and other consumers of water in fixing its rates of toll for its service. It also appears that subsequent to 1885 the company furnished water to its shareholders and to the lessees of shares of stock, whether appropriators or not, upon any land or lands which such shareholders or lessees of the same might designate, and declined to furnish water to persons not shareholders or the lessees of shares of stock, or the holders of so-called water-right deeds.

In the case of *Slosser v. Salt River Valley Canal Company*, 7 Ariz. 376, 65 Pac. 332, we held that a canal company having a similar organization, history, and relations to its consumers of water as shown in the case of the Maricopa Canal Company, was not a mere private agency having no other duty than the supplying by means of its canal water for particular appropriators whose agent it was, but occupied the *status* of a public agency, it having undertaken the diversion and carriage of water without regard to fixed contractual relations obligating it to perform such service for particular appropriators and limiting its service to the needs of such appropriators. We further found that as such agency such canal company does not possess the right to discriminate in rendering service as a carrier of water in any other way than the law in the first instance discriminates in recognizing the right of prior appropriation; that temporary leases or orders from shareholders, whether appropriators or not, conferred upon the holders no right entitling them, by virtue thereof, to water for use upon lands not owned or possessed by said shareholders; that the practice of the company recognizing such leases as valid was not in keeping with the spirit of our water laws, and was a clear violation of expressed provisions of our statutes, for the reasons that such canal company was not itself an appropriator of water, and that neither it, therefore, nor its shareholders as such possessed any power of control or any right of disposition over the water diverted and carried, save to transport and deliver the same to appropriators entitled to it under the law of prior appropriation; that water diverted from a public stream by such canal

company did not lose its character as public water, but remained public property until actually used by such appropriator. It was further found that the recognition by the company of "floating" water-rights, as they were termed, as incident to the ownership of shares of stock, and the practice of furnishing water to the lessees of such shares of stock for particular seasons, in effect was the same as though the canal company had supplied such lessees with water without the consent of its shareholders.

Applying these principles to this case, it follows that the Maricopa Canal Company from the time of its organization has been a public agency as a carrier of water. It also follows that, if the water it diverted and carried remained public property until actually used by appropriators, it was the subject of appropriation to the same extent and in the same manner as when it flowed in the channel of the Salt River. Under our statutes an appropriator of water for irrigation is one who makes an application of public water upon land he owns or possesses. To perfect such an appropriation two things are essential,—the ownership or possession of land, and the application thereon of public water to a beneficial use. No statute, either territorial or congressional, makes the ownership of the means of diversion essential to perfect the right of appropriation. Such means may be owned by another. Since, as stated in the Slosser case, a canal company organized for the purpose of the diversion and carriage of water for irrigation, and not being the owner of arable and irrigable land, is not an appropriator of water, it follows that the diversion of public water would be unlawful were the consumers of such water not appropriators in the fullest sense. When the canal company is not itself the appropriator, its only warrant for its diversion of water is that it supplies appropriators. All, therefore, whom it does supply and who make use of the water thus supplied for the irrigation of their lands are the appropriators whom, by its act of diversion and carriage, it undertakes to serve. It follows, therefore, that all persons owning lands under the flow of such a canal which have been irrigated by means of water furnished by such canal became appropriators, and possessed of rights of appropriation in the order of their priority. Had Gould, therefore, not been an appropriator before obtaining water

from the Maricopa Canal, he became such at the time he first obtained it from this source and applied it upon his land. Gould and his grantors have irrigated the land in question continuously since 1869. The circumstances under which Gould changed his mode of diversion by taking water from the Maricopa Canal instead of the Wilson Ditch cannot be held to have been an interruption of his original right of appropriation. We know of no provision of law by which a right of appropriation may be thus lost. It may be lost by abandonment, or it may be lost to another by adverse user on the part of the other, continued for the period of the statute of limitations, and in no other way. Abandonment is a matter of intent as such intent may be evidenced by the declaration of the party, or as may be fairly inferred from his acts. It cannot be fairly inferred that Gould, by abandoning the use of the ditch rendered useless as a carrier of water by reason of increased diversions from Salt River by older canals, including the Maricopa Canal, and by later diversions by newer canals, intended thereby to abandon his right of appropriation. Such an inference would be unjust to him, and not warranted by the facts.

The stipulation referred to in the statement of facts which Gould was required to sign as one of the conditions upon which he was permitted to obtain water from the canal is of no effect in lessening the liability of the canal company or the rights of Gould as an appropriator of water. As we have said, the water which the canal company diverted and carried was public property, and hence the canal company in its distribution could enforce only such rules and regulations as would be necessary and proper to secure economy of use, the rights of other appropriators, and its own right to collect a reasonable charge for its service. The law fixed and determined the extent and character of the appropriation made by each consumer of water, and the canal company possessed no power by contract to place any limitation upon such appropriation or to lessen its obligation in respect thereto. To recognize the binding force of the stipulation would be to concede to the company powers which it does not possess.

In the light of fuller discussion and a re-examination of the subject, we now hold, contrary to our holding in the Slosser case, that a canal company occupying relations to its

consumers of water like that of the Maricopa Canal Company may not arbitrarily discontinue its service in whole or in part. While such a canal company, in the nature of things, cannot be a common carrier, as that term is used in law, it is yet a quasi-public servant. By an act of Congress approved July 26, 1866, canal companies were granted rights of way for the construction of canals over the public domain. They were also given the right of eminent domain by our territorial statutes. The granting of these privileges presupposes a public use. *Oury v. Goodwin*, 3 Ariz. 255, 26 Pac. 377. As a quasi-public servant, having received benefits from the public, such a canal company owes a duty to conduct its business as a carrier of water in such a way as may best promote the interests of the community, when this may be done without sacrifice of any of its rights of property. The community is interested in the permanent reclamation and improvement of lands. If a right of appropriation might be made of no use to its holder through the refusal of a canal company to divert and carry the water to which such holder is entitled, and which the canal company has theretofore diverted and carried, the holding of such right of appropriation by such a precarious tenure would not only impair its value to the holder, but would discourage the making of improvements and the putting of the land to which it is attached to its highest and best use. To the extent, therefore, that such a canal company has diverted and carried water from a public stream, and to the extent to which this water has been applied by appropriators for the necessary irrigation of their lands, the canal company must continue this service so long as such service is required by said appropriators and the water is available from the common source. Should the water not be available, of course the company cannot suffer any liability to its appropriators, for the measure of its duty is its ability to comply with the reasonable demands of appropriators.

In the case of the Maricopa Canal Company it appears that its practice has been at the beginning of each irrigating season to contract with such appropriators as may desire water for the ensuing irrigating season to supply such water in consideration of the payment of its charge for such service. It was argued in the brief of counsel for the canal company that if it be held that the canal company is obliged to furnish

water to all landowners under the flow of its canal heretofore irrigated by it, whether shareholders or lessees of the same or not, the practical result would be that the canal company might be required to furnish more water than it is capable of delivering. This view of the relations of the canal company to such landowners is not to be inferred from the above holding. If applications for water be made during any season in excess of the capacity of the canal to furnish it, the canal company would have the right, and indeed it would be its duty, to limit the contracts for the season to its capacity and to those appropriators possessing the older rights of appropriation. In making its contracts for such service it can easily guard against incurring liability to appropriators by reason of the amount of water available from the Salt River being insufficient to supply their needs.

Upon the authority of the Slosser case, as modified in this decision, the judgment of the court below will be reversed, and a decree will be entered in this court establishing appellant's rights as an appropriator of water to the extent needed for the irrigation of his lands, and requiring the appellee to deliver water to an amount not exceeding seventy miner's inches, being the maximum amount heretofore used by him for said purpose, upon the payment by appellant of such reasonable charge as may be established by appellee for its service and a compliance by appellant with the reasonable rules and regulations which may be established by said company in other respects; and that said canal company be required to continue to render said service under said conditions so long as it may possess the ability so to do without injury to the rights of other appropriators having prior rights of appropriation.

Kent, C. J., Doan, J., and Davis, J., concur.

[Civil No. 740. Filed March 26, 1904.]

[76 Pac. 602.]

THOMAS BROCKMAN, Plaintiff and Appellant, v. THE
GRAND CANAL COMPANY, a Corporation, Defendant and Appellee.

1. WATER AND WATER-RIGHTS — APPROPRIATION—ABANDONMENT—NEW APPROPRIATION.—Where an appropriator of water was the owner of land and of a share of stock in a canal company representing a water-right privilege therein, and thereafter sold the land and stock to one S., and later repurchased the land without the stock, and after such repurchase obtained water from the canal company by renting other water-rights or shares of stock representing them, by such sale and repurchase he abandoned his first appropriation and his subsequent irrigation of the same land by means of water obtained from the company's canal then and thereby initiated a new right of appropriation.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Maricopa. Webster Street, Judge. Reversed.

On rehearing. Memorandum decision, *ante*, p. 112.

Docketed and dismissed with costs. 195 U. S. 639, 49 L. Ed. 356.

The facts are stated in the opinion.

W. H. Stilwell, and Kibbey & Edwards, for Appellant.

C. F. Ainsworth, for Appellee.

(For briefs, see *Gould v. Maricopa Canal Co.*, *ante*, p. 429.)

SLOAN, J.—This case is controlled by the law applied in the case of *Gould v. The Maricopa Canal Company* (decided at this term), *ante*, p. 429, 76 Pac. 598.

The organization of the appellee, the Grand Canal Company, its history, its practice with regard to the recognition of leases of its shares of stock by the holders thereof, give it the *status* found by this court to have been assumed by the

Salt River Valley Canal Company in the case of *Slosser v. Salt River Valley Canal Company*, 7 Ariz. 376, 65 Pac. 332, and the Maricopa Canal Company in the case of *Gould v. The Maricopa Canal Company*. The record shows that Brockman, from 1878 to 1888, was the owner of a share of stock in the Grand Canal Company, and of the water-right privilege recognized as appurtenant thereto, and irrigated his land by means of the same from the company's canal; that in the year 1888 he sold his land and water-right to one Shook; that in 1890 he repurchased his land without the water-right, and thereafter obtained water from the canal company by renting other water-rights, or shares of stock representing them, until the year 1899, when he applied for water for the ensuing season, and was denied the same by the appellee upon the ground that he was not a shareholder or the lessee of a share of stock.

The segregation of his water-right from the land, and the sale of the latter to Shook, and his repurchase of the land without the water-right, must be held to have been an abandonment by Brockman of his original right of appropriation. Under the law declared in the Gould case, when, after his repurchase, he began the irrigation of his land by means of water obtained from the appellee's canal, he then and thereby initiated a new right of appropriation.

The judgment of the court below is reversed, and a decree will be entered enjoining the Grand Canal Company from in any manner or by any means whatsoever preventing a flow of water from the Salt River through the Grand Canal to the lands of plaintiff, described in the complaint, in an amount sufficient for the proper cultivation of the same, and not exceeding the amount used by him upon said land and furnished by the appellee since 1890, upon the payment to the appellee of its reasonable charge for such service, and a compliance with the reasonable rules and regulations governing the diversion, carriage, and distribution of water in its canal, whenever and at all times when the water available for diversion and carriage in the company's canal is not required and used by appropriators of water under the canal having prior rights of appropriation.

Kent, C. J., Doan, J., and Davis, J., concur.

[Civil No. 830. Filed March 26, 1904.]

[76 Pac. 596.]

UNITED STATES OF AMERICA, Plaintiff and Appellant,
v. ALBERT J. GRISWOLD, Defendant and Appellee.

1. POSTMASTERS — BOND — LIABILITY — LOSS OF REGISTERED PACKAGE — REV. STATS. U. S., SEC. 3834 (U. S. COMP. STATS. 1901, P. 2610), AND SEC. 3926 (U. S. COMP. STATS. 1901, P. 2685), CONSTRUED.— Under section 3834, *supra*, providing that a postmaster shall give bond for the faithful discharge of all duties imposed either by law or the rules of the department, and section 3926, *supra*, authorizing the postmaster-general to establish a uniform system of registration, conditioned that the post-office department, or its revenue, shall not be liable for the loss of any mail matter on account of its having been registered, the sureties on a postmaster's bond, conditioned as required by section 3834, *supra*, are liable for the loss of a registered letter occasioned by the negligence of the postmaster.
2. BONDS — OFFICIAL — HOW CONSTRUED.— All bonds given by government officials are to be construed as though executed and to be performed at Washington, and hence are to be construed according to the rules of the common law, except where these rules have been changed or modified by statutes.
3. POSTMASTER — BOND — ACTION ON — PARTY PLAINTIFF.— Suit cannot be brought by the owner of a registered package in his own name on a postmaster's bond to recover for negligent loss of the package.
4. SAME — SAME — LOSS OF REGISTERED PACKAGE — EXTENT OF LIABILITY — REV. STATS. U. S., SEC. 3834 (U. S. COMP. STATS. 1901, P. 2610), AND SEC. 3926 (U. S. COMP. STATS. 1901, P. 2685), CONSTRUED.— Under section 3834, *supra*, requiring a postmaster to give bond conditioned for the faithful discharge of all duties, and section 3926, *supra*, in regard to registration of mail matter, providing that the sender shall be entitled to be indemnified to the extent of ten dollars, the United States may recover on a postmaster's bond the full value of a registered package, though exceeding ten dollars, the recovery being for the benefit of the sender.
5. BOND — OFFICIAL — PLEADING — PARTIES.— Where suit is brought by the United States on a postmaster's bond to recover the value of registered mail matter lost through his negligence, it is unnecessary for the pleadings to state that the suit is for the use of the sender of such registered matter, it being sufficient if it appears that the United States is suing to recover the loss suffered by the sender.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. George R. Davis, Judge. Reversed.

The facts are stated in the opinion.

Frederick S. Nave, United States Attorney, and John H. Campbell, Assistant United States Attorney, for Appellant.

Eb. Williams, and Bumler, McNeill & Richardson, for Appellees.

The government is neither an executor nor administrator, nor is it authorized to bring this suit by statute. Rev. Stats. Ariz., art. 1299, sec. 90, p. 431.

The government is not a person with whom nor in whose name a contract for the benefit of another is made, nor assignee of any chose in action. Rev. Stats. Ariz., art. 1300, sec. 91, p. 431.

The complaint does not state facts sufficient to constitute a cause of action in this, that it appears that the money alleged to have been stolen nor any thereof was the property of the plaintiff, and that the plaintiff is not in law liable therefor nor any part thereof. U. S. Rev. Stats., 3926; Postal Guide, A. D. 1902, p. 901.

Neither the government, the post-office department, nor its revenues is liable for the loss of registered mail. U. S. Rev. Stats. 3926.

The defendants are liable to P. Sandoval & Co., and not to the plaintiff, for the loss of this money. *Teall v. Felton*, 1 N. Y. 537, 49 Am. Dec. 352; *Stephenson v. Monmouth Min. etc. Co.*, 84 Fed. 116, 22 C. C. A. 292.

The plaintiff cannot sue on the postmaster's bond for the use of P. Sandoval & Co.; 2 Beach on Modern Law of Contracts, 1712.

Money stolen from office not a breach of bond for faithful performance of duty. *Supervisors of Albany Co. v. Dorr*, 25 Wend. 440; *Rose v. Hatch*, 5 Iowa, 149; *United States v. Jones*, 36 Fed. 759.

Postmaster's bond is for a penalty, and not for liquidated damages; plaintiff can, therefore, recover such damages as it has suffered. U. S. Rev. Stats., 3834; 4 Am. & Eng. Ency.

of Law, p. 700; *Pierce v. Fuller*, 8 Mass. 223, 5 Am. Dec. 102; *Bignall v. Gould*, 119 U. S. 495, 30 L. Ed. 491, 7 Sup. Ct. 294.

It appears affirmatively from said complaint that, as to plaintiff, the alleged breach was not the cause of any damage to plaintiff, and therefore that said alleged breach of said bond or undertaking set out in plaintiff's complaint is, as to plaintiff, *damnum absque injuria*, and does not support an action for damages. Hale on Damages, pp. 11, 21; 14 Q. B. Div., pp. 141-150; *Christner v. Cumberland etc. Coal Co.*, 146 Pa. St. 67, 23 Atl. 221; 8 Am. & Eng. Ency. of Law, p. 550; 21 Am. & Eng. Ency. of Law, p. 498.

The defendants are answerable for the consequences of negligence, and not for its abstract existence. (Authorities cited first above.)

It is axiomatic that no negligence will be actionable unless it results in injury or damage.

The cases of the *United States v. Prescott*, *United States v. Thomas*, and *United States v. Jones*, relied upon by appellant, are cases for the loss of public moneys under bonds conditioned to account for and pay over.

We therefore respectfully call the attention of the court that the money in this case is not public money, but the private money of P. Sandoval & Co.

"The government must recover, if at all, upon the theory of a breach of contract. Without alleging any damage as the result of said breach, can it do this?"

SLOAN, J.—The United States brought suit in the court below against Albert J. Griswold, postmaster at Nogales, Arizona, and L. W. Mix, Edward Titcomb, Theo. Gebler, and Fred. Herrera, sureties upon the official bond of said Griswold as postmaster aforesaid, to recover the sum of \$1,863, alleged to have been lost from the mails after the same had been registered and deposited in the post-office at Nogales by P. Sandoval & Co. It was alleged in the complaint that the registered package containing this money was stolen from the post-office by reason of the negligence of the postmaster. The defendants in the action demurred to the complaint upon the ground that the facts therein stated did not constitute a cause of action in favor of plaintiff and against the defend-

ants. The demurrer was sustained by the trial court, and from this order and ruling of the court the United States has appealed.

The first question presented is: Does the loss of the registered package, occasioned by the negligence of the postmaster, amount to a breach of the bond given by such postmaster, under section 3834, United States Revised Statutes [U. S. Comp. Stats. 1901, p. 2610]? This section provides that "every postmaster, before entering upon the duties of his office, shall give bond, with good and approved security, and in such penalty as the postmaster-general shall deem sufficient, conditioned for the faithful discharge of all duties and trusts imposed on him either by law or the rules and regulations of the department." The bond in this instance, given by Griswold, contained the condition required by said section, being in all respects as required by law and the rules and regulations of the post-office department having the effect of law. Section 3926, United States Revised Statutes [U. S. Comp. Stats. 1901, p. 2685], authorizes the postmaster-general to establish a uniform system of registration conditioned that the post-office department, or its revenue, should not be liable for the loss of any mail matter on account of its having been registered. It is a part of the duty of the postmaster to safely keep and to transmit the mails, including registered packages, which may be given into his hands as such postmaster. His oath of office requires him to faithfully perform the duties of his office. It is a general proposition that a public officer, having ministerial duties to perform, is liable for any injury occasioned by him in consequence of his failure to perform his official duty. *Raynsford v. Phelps*, 43 Mich. 344, 5 N. W. 403, 38 Am. Rep. 189. Thus it has been held that a postmaster is liable in damage for conversion of mail matter at the suit of the person injured. *Teal v. Felton*, 12 How. 284, 13 L. Ed. 990. It has also been held that a postmaster is liable for the loss of a letter containing money, occasioned by his negligence, at the suit of the sender. *Danforth v. Grant*, 14 Vt. 283, 39 Am. Dec. 224. If a postmaster can be held responsible in damages for loss of mail matter occasioned by his negligence, it must be for the reason that he has been derelict in his duty as such officer. Such a failure, under the condition of his official bond that he will

"faithfully discharge the duties of his office," amounts to a breach of the bond; and in such a case the liability of the principal is the measure of the liability of the surety. All bonds given by government officials are to be construed as though executed and to be performed at Washington, and hence are to be construed according to the rules of the common law, except where these rules have been changed or modified by statute. *Cox v. United States*, 31 U. S. 172, 8 L. Ed. 359. At common law suit upon an official bond must be brought and a recovery had in the name of the obligee. There is no congressional statute modifying the common-law rule limiting the liability of sureties to suits brought by or in the name of the United States, as there is in the case of bonds given by United States marshals. In the latter case there is statutory authority authorizing any person to bring, in his own name and for his sole use, suit on the marshal's bond for a breach of its conditions. Section 784, United States Revised Statutes [U. S. Comp. Stats. 1901, p. 607]. It follows, therefore, that P. Sandoval & Co. could not maintain a suit on the postmaster's bond in their own name to recover for the loss of the registered package.

Can the United States maintain such a suit? It has been held that a bailee may sue and recover in his own name damages caused to the subject of the bailment through the negligence of a third person. In such case the measure of damages is not limited to the bailee's special interest in the property, but he may recover for all damages, holding the amount so recovered in excess of his own interest in trust for his bailor. *Woodman v. Nottingham*, 49 N. H. 387, 6 Am. Rep. 526; *McGill v. Monette*, 37 Ala. 49; *Rindge v. Coleraine*, 11 Gray, 159. The United States, in this instance, was the bailee and intrusted with the safe-keeping of the registered package deposited by P. Sandoval & Co. Under section 3926, United States Revised Statutes [U. S. Comp. Stats. 1901, p. 2685], the sender of first-class registered matter is entitled to be indemnified out of the postal revenues for loss in the mails to the extent of ten dollars for any one registered package, or the actual value thereof when that is less than ten dollars. The government, in accepting a registered package, becomes not only the bailee of the sender, but assumes a liability to its bailor by reason of the bailment. Even should

we therefore construe the liability of the sureties in its strictest sense, the government, as a bailee, would have a right to recover to the extent of its special interest, which would be measured by the extent of its liability to the sender of the package. If the government, therefore, has a right to sue to recover the loss it sustains as bailee, under the general doctrine above stated, its recovery cannot be confined to such special interest, but may cover the entire loss sustained both by it and its bailor. Not only so, but we think it is the duty of the United States to protect the public against its own officers, even to the extent of enforcing every legal right which it possesses, whether criminal or civil. To hold that the United States may not maintain an action upon the bond of the postmaster for the recovery of the entire loss sustained by the negligence of the postmaster because it was not obligated to return or make good to P. Sandoval & Co. an amount exceeding ten dollars, would be to deny to the latter any redress unless the postmaster be personally responsible to the extent of such loss. We are convinced that in a case like the one at bar the United States may sue for the benefit of the injured party and recover from the sureties upon the official bond of the postmaster the full amount of such loss, and that it is the clear duty of the government to bring such action. At common law such suits were usually brought "for the use of" or "at the relation of" the injured person. It is not essential, however, that there be any formal declaration of such use; its only purpose being to protect the interest of the beneficiary against the nominal plaintiff. *Tedrick v. Wells*, 152 Ill. 217, 38 N. E. 625; *Clay Fire and Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co.*, 31 Mich. 346. In the complaint the facts sufficiently show that the United States is suing for the amount of the loss suffered by P. Sandoval & Co. and for their benefit, and it will not be assumed that the government will appropriate the amount recovered to its own use, but it will be assumed that it will perform its duty by paying to P. Sandoval & Co. the amount so recovered.

We hold that the complaint stated a cause of action, and the judgment will therefore be reversed and the cause remanded for further proceedings.

Kent, C. J., and Doan, J., concur.

[Civil No. 787. Filed March 26, 1904.]

[76 Pac. 595.]

THE COUNTY OF COCHISE, et al., Defendants and Appellants, v. COPPER QUEEN CONSOLIDATED MINING COMPANY, Plaintiff and Appellee.

1. TAXES AND TAXATION — INJUNCTION — APPEAL AND ERROR — NEW TRIAL—WHEN GRANTED.—An appellate court, on reversing a decree enjoining a county from collecting or in any way attempting to collect a tax, will not continue the injunction merely because the law for the collection of taxes in force when the suit was brought has been repealed, but will remand the case for a new trial inasmuch as there may be a method to collect the tax under the new law.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. George R. Davis, Judge. Reversed.

On rehearing. For former opinion, see *ante*, p. 221.

D. L. Cunningham, District Attorney, Allen R. English, and Edwards & McFarland, for Appellants.

Herring & Mitchell, for Appellee.

SLOAN, J.—We adhere to the views expressed in the opinion heretofore filed in this case. (*Ante*, p. 221, 71 Pac. 946.) The order of the court was that the judgment should be reversed, and the case remanded for a new trial.

Counsel for appellee now argue that this order should be modified for the following reasons: It is suggested that the relief prayed for by appellee in its complaint was the prevention of a sale of its property by the tax-collector of Cochise County to enforce the payment of the taxes levied against said property for the year 1901; that, under the law as it then existed, after March 3, 1902, the tax-collector lost jurisdiction in the premises; and that there was no method provided by which said taxes could be collected. It is therefore urged that, "if the court should adhere to the opinion already announced, . . . a new trial in the district court could have no practical result whatever. If the district court, upon

the whole evidence, should dismiss the complaint, the plaintiff would be in no way injured, the defendant in no way benefited; and precisely the same result would follow if, upon the whole evidence, the court should decide that the plaintiff was entitled to an injunction, because an injunction, at that stage of the case, would in no way affect the rights of either party." It is also suggested that the only proper course open to the court is either to affirm the judgment, or to dismiss the appeal on the ground that there is no substantial controversy between the parties now, and that no good results can follow from any further litigation in the case.

An examination of the injunction granted by the trial court shows that it restrains the tax-collector and the county of Cochise from collecting, or in any manner attempting to collect, the taxes in question. The order is not restricted to the prevention of a sale by the tax-collector under the provisions of the law in force and effect at the time the suit was brought. If, therefore, we were to follow the suggestion, and either affirm the judgment or dismiss the appeal, the effect would be to continue in force this injunction, and to tie the hands of the tax-collector of the county from hereafter collecting or attempting to collect the taxes for the year 1901 in any manner or at all. It is true that the law in force and effect at the time the injunction was granted has been repealed, and, even had it not been repealed, it may be that no sale could now be made by the tax-collector. It does not follow that there may not be, under the law of 1903, a method for the collection of this tax. At any rate, inasmuch as we found that the judgment should be reversed, this injunction ought not to be permitted to stand; and as we found that the appellee, under the allegations of its complaint, is entitled to some relief, the only disposition we can properly make of the case is to remand it for a new trial.

It may be admitted, as suggested by counsel for the appellee, that it will be entirely within the power of the appellee, when the case is remanded, to dismiss the action. Until the action is dismissed, there will still remain a substantial controversy between the parties, unless it be conceded by the appellants that there remains no method of enforcing the collection of the tax—a concession which doubtless will not be made.

We see no reason to change or modify the order reversing the judgment and remanding this case for a new trial.

Kent, C. J., and Doan, J., concur.

[Criminal No. 173. Filed March 26, 1904.]

[76 Pac. 611.]

UNITED STATES OF AMERICA, Plaintiff and Appellant,
v. JOHN STOFELLO, Defendant and Respondent.

1. CRIMINAL LAW—INDIANS—INTOXICATING LIQUORS—KNOWLEDGE—INTENT—NOT ESSENTIAL ELEMENT OF OFFENSE—ACT OF CONGRESS JANUARY 30, 1897, 29 STATS. 506, c. 109, CONSTRUED.— Under the act, *supra*, making it an offense for any person to sell, give away, or dispose of intoxicating liquors to an Indian, a ward of the government, under the charge of an Indian superintendent or agent, knowledge or intent is not an essential ingredient, and it is no defense that the defendant actually believed that the person to whom he sold was a Mexican.

APPEAL from a judgment of the District Court of the First Judicial District. George R. Davis, Judge. Requested instruction held proper.

The facts are stated in the opinion.

Frederick S. Nave, United States Attorney, and John H. Campbell, Assistant United States Attorney, for Appellant.

No appearance for Respondent.

SLOAN, J.—One John Stofello was indicted, tried, and acquitted in the court below for the crime of giving, selling, and disposing of intoxicating liquor to an Indian, a ward of the government of the United States, under charge of an Indian agent. The indictment was brought under the act of Congress approved January 30, 1897 (29 Stats. 506, c. 109), which, in part, reads as follows: "Any person who shall sell, give away, dispose of, . . . intoxicating liquors . . . to

an Indian, a ward of the government, under the charge of an Indian superintendent or agent, . . . shall be punished," etc. Upon the trial the defendant was permitted to show that he sold the liquor under the honest belief that the Indian to whom he sold it was a Mexican. The United States attorney requested the court to give the following instruction: "The statute makes it an offense to sell, give away, or dispose of, intoxicating liquor to an Indian, a ward of the government, under charge of an Indian agent. It is not an element of this offense that an offender shall know the person to whom he sells, gives away, or disposes of intoxicating liquor is an Indian, a ward of government, under charge of an Indian agent. The law places the risk as to the lawfulness of the selling, giving, or disposing of intoxicating liquor upon the one who sells, gives, or disposes of the liquor. Therefore it is not a proper defense for one charged with the commission of this offense to assert that he did not know the person to whom he sold, gave, or otherwise disposed of the liquor, was an Indian, if in fact he did sell, give away, or dispose of intoxicating liquor to an Indian, a ward of the government, under charge of an Indian agent, knowing at the time that he was selling, giving away, or disposing of intoxicating liquor to some person." The court refused to give this instruction, and the government has brought this appeal, under section 1038 of the Penal Code, to test the correctness of this ruling.

It will be noted that the statute, in plain terms, makes the selling, giving, or disposing of intoxicating liquor to an Indian, a ward of the government, under the charge of an Indian superintendent or agent, a crime. The word "knowingly" is not used in the act, nor is any word of similar import found therein. An examination of the authorities has satisfied us that the offense created by the statute is of that class of crimes in which knowledge or guilty intent is not an essential ingredient, and need not be proven. The doing of the prohibited thing is made an offense, without regard to the purpose or intent. Such crimes are in the nature of police regulations, imposing criminal penalties for their violation, without regard to purpose or intent. The object of such statutes is to require such diligence as will render their violation impossible, the end sought being the protection of the public. *People v. Roby*, 52 Mich. 577, 18 N. W. 365, 50 Am.

Rep. 270; *People v. Curtis*, 129 Mich. 1, 95 Am. St. Rep. 404, 87 N. W. 1040; *Commonwealth v. Emmons*, 98 Mass. 8; *Commonwealth v. Stevens*, 155 Mass. 294, 29 N. E. 503; *Commonwealth v. Julius*, 143 Mass. 134, 8 N. E. 898; *Commonwealth v. Zelt*, 138 Pa. St. 615, 21 Atl. 7, 11 L. R. A. 602.

We hold that the instruction asked for correctly stated the law, and should have been given.

Kent, C. J., and Doan, J., concur.

[Civil No. 840. Filed March 26, 1904.]

[76 Pac. 623.]

CHARLES M. TAYLOR, Plaintiff and Appellant, v.
THOMAS BURNS et al., Defendants and Appellees.

1. **SALE—CONTRACT—POWERS—INTERPRETATION—NOT COUPLED WITH AN INTEREST—REVOCABLE AT WILL.**—Where the owner of certain mining claims, for a consideration of one dollar, and money and labor theretofore expended, and of labor thereafter to be expended on said claims, sold them to plaintiff on condition that he should pay, whenever he could sell the mines, forty-five thousand dollars, and in addition thereto one eighth of whatever was received in excess thereof, the agreement also providing that the parties were to aid each other in the negotiation and sale, and the owner agreeing to execute any deeds necessary to convey a good title to any purchaser, the agreement conveyed no title to or estate in the mines to plaintiff, but was merely a power of attorney to sell, not coupled with an interest and revocable at the will of the owner.
2. **SAME—SAME—CONSTRUCTION.**—The intention of the parties to a contract must govern, as the intention is evidenced by a consideration of the entire instrument. Particular words may not be isolatedly considered, but the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them.
3. **POWERS—WHEN IRREVOCABLE—TRICKEY v. CROWE, ANTE, P. 176, 71 PAC. 965, FOLLOWED.**—The interest which will render a power of attorney irrevocable must be in the subject of the power, and not pertain to the power itself.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. Fletcher M. Doan, Judge. Affirmed.

Affirmed. See opinion, 203 U. S. 120.

The facts are stated in the opinion.

Barnes & Martin, and D. L. Cunningham, for Appellant.

We contend that the agreement placed in evidence in this case was not a power of attorney at all, but a contract of sale, and for good consideration, and hence irrevocable by the party of the first part; it could only be rescinded and set aside by the consent of both parties.

It was contended that the granting word in this contract—viz. the word “sells” (“said Burns *sells* to said party of the second part said mining claims”)—is not a word of conveyance but is applicable only to personal property, and is not a word which can be used or construed as giving any title or right to a mining claim. This we deny. But for the statute of frauds, section 2708, which makes the term “real estate” under the statute of frauds to include mines and mining claims, mining claims could be sold orally. But the statute of frauds requires that a contract for a sale of real estate shall be in writing, and includes mining claims under the head of real estate in that title. This title simply provides that such contracts shall be in writing, and is not an authority for the form of the document. Mining claims may be sold by bill of sale so far as that statute is concerned. It is held, in *Table Mountain T. Co. v. Stranahan*, 20 Cal. 198, that mining claims can be transferred orally. The statutes of California afterwards required them to be in writing. In the absence of such a statute an oral transfer would be good. This has also been held in *Union Con. Min. Co. v. Taylor*, 100 U. S. 37, 25 L. Ed. 541, and *Lockhart v. Rollins*, 2 Idaho, 540, 21 Pac. 413.

A mining claim is not an estate of any of the tenures known at common law; it is not an estate in fee; it is land owned by the United States, in which the United States permits citizens to acquire certain rights upon certain conditions. These rights so acquired become very valuable oftentimes, and the

rights of a citizen who has complied with the acts of Congress are as complete as though he owned in fee simple, but it is merely a license granted him by the government. "They are subject to bargain and sale. They are property in the fullest sense of the word. May be sold, transferred, mortgaged and inherited." Miller, Justice, in *Forbes v. Gracey*, 94 U. S. 762, 24 L. Ed. 313; *Belk v. Meager*, 104 U. S. 279, 26 L. Ed. 735, says actual possession is not necessary for the protection of title acquired by valid location; it is simply the right to possession, while the paramount title remains in the United States.

Such a right is transferred by the term "sell" without any regard to the character of the fee or of the title, and the word "sell" in a contract is a word of assignment of all the right to possession of the party who is the seller, and the ordinary words of conveyance, "grant, bargain, and sell," are not required. The words "grant" and "bargain" are not necessary because the term "sell" implies and carries with it all right of the locator to the possession of the claims. (*Krider v. Lafferty*, 1 Whart. 303.)

If, however, it is to be construed as a power of attorney, it was a power of attorney coupled with the right of possession, which was all that Burns had; it was an interest in the subject-matter for good and valuable consideration, and a power coupled with such an interest could not be revoked. It was held, in *Hunt v. Rousmanier's Admrs.*, 8 Wheat. 175, 5 L. Ed. 589, that a power of attorney coupled with an interest is irrevocable and binds the party giving it, and may be executed after his death. Where an authorization or power of attorney is coupled with an interest, or where it is given for valuable consideration, it is, from its own nature and character, irrevocable. *Knapp v. Alword*, 10 Paige, 205; *Bonney v. Smith*, 17 Ill. 533; *Raymond v. Squire*, 11 John. 47.

Herring & Sorin, for Appellees.

It is well settled that, though an instrument contains words expressing an absolute transfer, it will not be construed as a deed if, taking the whole instrument together, it appears that such was not the intention of the parties. *Peterson v. McCauley* (Tex. Civ. App.), 25 S. W. 826; *Wallace v. Wilcox*, 27 Tex. 60; *Sherman's Lessee v. Dill*, 4 Yeates (Pa.), 295, 2

Am. Dec. 408; *Stewart v. Lang*, 37 Pa. St. 201, 78 Am. Dec. 414; *Jackson v. Moncrief*, 5 Wend. 26; *Dunnaway v. Day*, 163 Mo. 415, 63 S. W. 731; *Williams v. Paine*, 169 U. S. 76, 42 L. Ed. 658, 18 Sup. Ct. 279; *Anderson v. Read*, 106 N. Y. 333, 13 N. E. 292.

SLOAN, J.—The appellant brought suit in the court below against the appellees to quiet title to three mining claims, known as the “Victor,” “Magnet,” and “Comet,” situate in the California Mining District, in Cochise County. These claims were located on the twenty-seventh day of February, 1900, by the appellee, Thomas Burns. On November 9, 1901, Burns conveyed a one-fourth interest in the claims to the appellee John A. Duncan, and on the ninth day of March, 1903, Burns and Duncan entered into an agreement for the sale of the claims with the appellee S. R. Kaufman, as trustee. The appellant, Taylor, bases his title to the claims upon an agreement entered into with Burns on the twenty-sixth day of March, 1901. This agreement is as follows:—

“This memorandum of agreement, made and entered into this 26th day of March, A. D. 1901, by and between Thomas Burns (a widower) of Cochise County, Arizona, the party of the first part and Charles M. Taylor of Tucson, Arizona, the party of the second part, Witnesseth:

“That the said party of the first part in consideration of the sum of one dollar lawful money of the United States of America in hand paid, the receipt whereof is hereby acknowledged, and for the further consideration of money and labor heretofore expended, and of labor to be hereafter expended in and upon the Magnet Mining Claim, the Comet Mining Claim and the Victor Mining Claim, situate in the California Mining District, in the Chiricahua Mountains, Cochise County, Arizona Territory, sells to the said party of the second part the said mining claims upon the terms and conditions following, to wit:

“The said party of the second part shall pay to the party of the first part, whenever he shall negotiate, sell or place said mines to any assignee of the said party of the second part, forty-five thousand dollars (\$45,000.00) and in addition thereto one-eighth ($\frac{1}{8}$) of whatever price the said party of the second part may be able to sell, place or negotiate the

said mines, for a consideration in excess of said \$45,000.00; that is to say the party of the second part is authorized to sell and negotiate the said mines for any price above the sum of \$45,000.00, and may retain out of said purchase price seven-eighths ($\frac{7}{8}$) of said selling price above such sum of \$45,000.

"The said parties hereto hereby mutually agree to aid each other in the negotiation and sale of said mining claims, to the end that the same may be sold and the consideration realized as quickly as possible. And the said party of the first part hereby agrees to execute any deed or deeds or conveyances that may be hereafter necessary to convey a good title to said mining claims to whomsoever may purchase the same.

"This contract is to take the place of and supersede any and all other contract or contracts heretofore made by said parties hereto, with reference to said mining claims.

"In Witness Whereof, the said parties have hereunto set their hands this twenty-sixth day of March, A. D. 1901.

"Executed in Duplicate.

"[Signed]

THOS. BURNS.

"C. M. TAYLOR."

Upon the trial of the action the court admitted this agreement in evidence, but found that it vested in plaintiff no estate, right, or title in or to the said mining claims, and gave judgment against the appellant and in favor of the appellees, quieting their title in and to the same.

The only question involved is the construction to be given the agreement between Taylor and Burns. The contention of the appellant is that the agreement amounted to a sale to him of the mines for a given and valid consideration expressed in the instrument. The contention of counsel for the appellees is that, from the instrument as a whole, it clearly amounts to nothing more than a power of attorney authorizing Taylor to negotiate the sale of the claims upon the terms stated in the agreement, revocable at will. Upon the latter contention it was admitted by the appellant that, if the instrument was revocable at the will of Burns, such revocation was made by Burns on February 27, 1903.

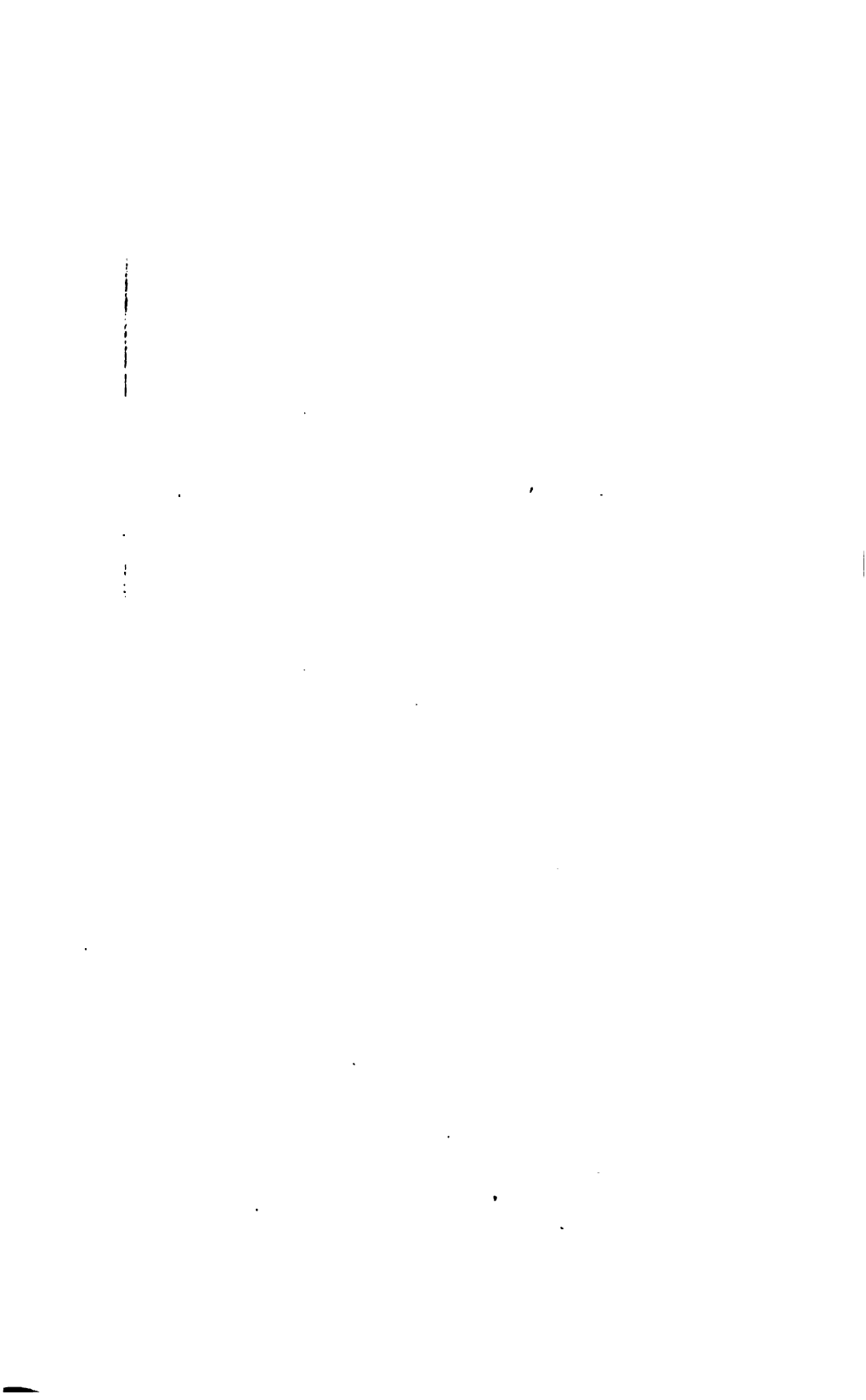
It is a settled rule of construction of instruments of this character that the intention of the parties must govern, as this intention is evidenced by a consideration of the entire instrument. *Williams v. Paine*, 169 U. S. 76, 18 Sup. Ct. 279,

42 L. Ed. 658. "The elementary canon of interpretation is not that particular words may be isolatedly considered, but that the whole contract must be brought into view and interpreted with reference to the nature of the obligation between the parties, and the intention which they have manifested in forming them." *O'Brien v. Miller*, 169 U. S. 287, 18 Sup. Ct. 140, 42 L. Ed. 469. Tested by this rule, the agreement cannot be construed as a conveyance. For a consideration, Burns agreed to sell upon certain terms and conditions expressed. These terms and conditions were that Taylor was empowered and authorized to sell and negotiate the mines for any price above forty-five thousand dollars; that, upon such sale being made, he should pay to Burns forty-five thousand dollars of the purchase price, and one eighth of the excess of the purchase price over and above forty-five thousand dollars, and that both parties should aid and assist each other in the negotiation and sale of the claims, in order that they might quickly be sold, and the consideration realized; and that, further, upon said sale, Burns should execute any deed or deeds of conveyance that might be necessary to convey a good title to the purchaser or purchasers. It will be noted that Taylor was not obligated to pay any sum or sums of money whatever. There is nothing in the instrument which would permit a recovery by Burns against Taylor of any part of the purchase price. Upon no theory can the instrument be construed as a sale *in presenti*. As an agreement to sell *in futuro*, it lacks the essential element of mutuality, in that Taylor was not obligated to pay the purchase price, or any part of it, or even to effect a sale. Again, the instrument expressly provides that, in case Taylor should effect a sale, the deed of conveyance should be made by Burns, which is an admission that the instrument was not to be construed as divesting Burns of his title, and that a conveyance from him would be necessary to vest his title in any purchaser. Not only does the contract fail to vest any title in Taylor, but it does not contemplate that Taylor should ever acquire the title. It merely provides that upon the contingency of a sale to another, brought about by his efforts or the joint efforts of himself and Burns, Taylor should share in the proceeds of such sale. Taking the instrument as a whole, it appears that it was intended merely as a power of attorney authorizing Taylor

to effect a sale of the mines, upon the terms mentioned, as the agent of Burns. Nor is this power of attorney one which, in legal effect, can be construed as being coupled with an interest in the mining claims, so that it could not be revoked. There is nothing in the instrument which evidences an intention that Taylor should acquire an interest in the premises pending a sale of the same. Mention of future labor as part consideration is of no avail as conferring an interest, for it fails to bind Taylor to perform any work; nor does it state by whom this labor was to be performed, when it was to be done, or of what it should consist. It is not even provided that Taylor should have any right of possession during the pendency of the sale, or should pay any of the expense of the annual labor required by law. Manifestly the only interest which Taylor acquired under the agreement was the contingent one of sharing in the proceeds of the sale in case he should effect it. The interest which will render the power of attorney irrevocable must be in the subject of the power, and not pertain to the power itself. As we have said, there is nothing in the instrument, taken as a whole, which gave Taylor any interest in the mining claims. He did not have the right of possession. His sole interest related to the consideration or proceeds to be derived from the sale. His power or agency was not, therefore, in legal contemplation, one coupled with an interest. In the case of *Trickey v. Crowe*, ante, p. 176, 71 Pac. 968, this court declared, in speaking of a power of attorney coupled with an interest, that by "such interest is not meant an interest in that which is produced by the exercise of power, but it must be an interest in the property on which the power is to operate"; and, further, that "the authority to sell on commission is not an authority coupled with an interest." We hold, therefore, that the agreement did not confer any title or estate in the mines in question upon Taylor, and that the findings and decree of the trial court are correct.

The judgment will be affirmed.

Kent, C. J., and Davis, J., concur.



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ACTION TO QUIET TITLE.

1. **ACTION TO QUIET TITLE—EQUITY—TRIAL—JURY—INTERROGATORIES—FINDINGS—ADVISORY—ERROR—CANNOT BE BASED UPON—REV. STATS. ARIZ. 1901, PAR. 1427, CONSTRUED—HENRY V. MAYER, 6 ARIZ. 103, 53 PAC. 590; EGAN V. ESTRADA, 6 ARIZ. 248, 56 PAC. 721, FOLLOWED.**—Where, in an equity suit to quiet title to a certain mining claim, the court in accordance with the provisions of statute, *supra*, submitted certain interrogatories concerning disputed issues of fact, error could not be predicated on the form in which the interrogatories were propounded, since the answers to the questions submitted could at most be only advisory. (Taggart Mercantile Co. v. Clack, 295.)

2. **ACTION TO QUIET TITLE—EVIDENCE—MORTGAGE—FORECLOSURE—NECESSARY PARTIES.**—In an action to quiet title evidence that plaintiff was the holder of a sheriff's deed upon foreclosure sale is insufficient to support a judgment in his favor as against defendants in possession and claiming title under a deed executed and recorded prior to the institution of the foreclosure proceedings, where it appears from the record in the foreclosure suit that defendants were not made parties therein. They being indispensable parties, were not bound by the foreclosure. (Goodwin v. Tyrrell, 238.)

3. **ACTION TO QUIET TITLE—PLEADING—PROOF—VARIANCE—REV. STATS. ARIZ. 1887, PAR. 3132, CONSTRUED.**—In an action under paragraph 3132, *supra*, providing that "An action to determine and quiet the

ACTION TO QUIET TITLE (Continued).

title of real property may be brought by any one having or claiming an interest therein, whether in or out of possession of the same, against another who claims an estate or interest adverse to him," where plaintiff alleged that he was the owner in fee of certain property, proof of an equitable title in plaintiff does not constitute such a variance as to preclude a recovery. (*Oliver v. Dougherty*, 65.)

4. SAME—EXECUTION SALE—PURCHASER—ACQUIRES EQUITABLE TITLE—MAY MAINTAIN ACTION TO QUIET TITLE—REV. STATS. ARIZ. 1887, PAR. 3132, CONSTRUED.—Where defendant purchased certain property at a foreclosure sale, receiving a sheriff's certificate, but no deed, and went into possession, and subsequently his interest was sold on execution, the purchaser acquires all the equitable title of defendant, and plaintiff as assignee can maintain an action against defendant to quiet title, under paragraph 3132, *supra*. (*Oliver v. Dougherty*, 65.)

See Mines and Mining, 1, 3, 6, 7.

ADMISSIONS. See Mines and Mining, 7.

ADVERSE POSSESSION. See Ejectment, 1, 2; Mines and Mining, 2.

ALIENS.

1. ALIENS—CHINESE EXCLUSION ACTS—PRIVILEGED PERSONS—CERTIFICATES—MERCHANTS—SALESMAN IS NOT—TREATY OF NOVEMBER 17, 1880 (22 STATS. 826), TREATY OF MARCH 26, 1894 (28 STATS. 1210), ACT OF CONGRESS OF JULY 5, 1884, c. 220, 23 STATS. 115 (U. S. COMP. STATS. 1901, p. 1305), AND ACT OF CONGRESS OF NOVEMBER 3, 1893, c. 14, SEC. 2, 28 STATS. 8 (U. S. COMP. STATS. 1901, p. 1323), CONSTRUED.—Under the treaties, *supra*, providing that Chinese persons entitled to come into the United States when provided with the certificate prescribed by act of Congress of July 5, 1884, *supra*, are Chinese subjects, being officials, teachers, students, merchants, or travelers for curiosity or pleasure, and under act of Congress of November 3, 1893, *supra*, defining the term "merchant," as used in the exclusion acts, to be a person engaged in buying and selling merchandise at a fixed place of business, which business is conducted in his name, and who does not engage in manual labor, except in the conduct of said business, a person described in his certificate as a "salesman" is not described as a merchant within the generally accepted meaning of the word or within the statutory meaning thereof. (*United States v. Gin Hing*, 416.)
2. SAME—SAME—CERTIFICATES—MUST CONFORM STRICTLY TO REQUIREMENTS OF EXCLUSION ACT—ACT OF CONGRESS OF JULY 5, 1884, c. 220, 23 STATS. 115 (U. S. COMP. STATS. 1901, p. 1305), CITED.—The provisions of the act, *supra*, requiring Chinese persons to procure

ALIENS (Continued).

certificates, stating certain facts, must be strictly complied with in order that the certificate may be of value to the person holding the same to establish his right to come or remain within the United States. (United States v. Gin Hing, 416.)

3. **SAME—SAME—SAME—SAME—MERCHANT—CERTIFICATE MUST CONTAIN WHAT—ACT OF CONGRESS OF MAY 6, 1882, c. 126, 22 STATS. 58 (U. S. COMP. STATS. 1901, P. 1305), AND ACT OF CONGRESS, JULY 5, 1884, c. 220, 23 STATS. 315, 1 SUPP. REV. STATS. U. S. 458 (U. S. COMP. STATS. 1901, P. 1305), CONSTRUED.**—Under the act of May 6, 1882, *supra*, it was not required that the certificate should state that "such person is entitled by this act to come within the United States," nor did it require that a *merchant's* certificate should state "the nature, character and estimated value of the business carried on by him." By the act of July 5, 1884, *supra*, these requirements were added to those then existing, and a certificate which fails to contain them is defective and affords to the holder thereof no right to enter or to remain within the United States. (United States v. Gin Hing, 416.)

4. **SAME—SAME—SAME—EVIDENCE—CERTIFICATE SOLE EVIDENCE OF RIGHT—ACT OF CONGRESS OF JULY 5, 1884, c. 220, 23 STATS. 115 (U. S. COMP. STATS. 1901, P. 1305), CONSTRUED.**—Under the act of July 5, 1884, *supra*, providing that the certificate shall be the sole evidence permissible on the part of the person producing the same to establish a right of entry into the United States, it is error for the court to receive evidence *aliunde* that a Chinese person, whose certificate states his occupation as "salesman" is in fact a merchant, and hence a member of a privileged class. (United States v. Gin Hing, 416.)

5. **SAME—SAME—SAME—SAME—SAME—EVEN IF PERMITTED TO ENTER BY COLLECTOR OF CUSTOMS.**—The certificate being the sole evidence permissible to establish a right of entry into the United States, and being required to be produced whenever lawfully demanded, and the act further providing that "any person found unlawfully within the United States shall be caused to be removed therefrom," the fact that the defendant has already been permitted to enter and is now within the country does not alter the rule, and no evidence *aliunde* is admissible to show that the holder is in fact a member of a privileged class. (United States v. Gin Hing, 416.)

Non-resident may maintain action for damages for death by wrongful act. See Death by Wrongful Act, 1.

AMENDMENT.

New cause of action, departure. See Limitations, 1.

Upon trial, allowance of discretionary. See Appeal and Error, 30.

See Pleading and Practice, 1.

ANIMALS. See Constitutional Law, 1.

ANSWER. See Pleading and Practice, 1.

APPEAL AND ERROR.

1. **APPEAL AND ERROR—ABSTRACT OF RECORD—BILL OF EXCEPTIONS—STATEMENT OF FACTS—NECESSITY FOR.**—An abstract of record cannot supply the absence of a bill of exceptions or statement of facts. (*Edwards v. Simms*, 261.)
2. **SAME—SAME—INSUFFICIENCY—PREVENTS REVIEW—WHEN.**—Where the record does not contain the full contents of deed offered in evidence and rejected, the judgment will not be reversed for such rejection, as there might have existed valid reasons therefor, such as the form of its acknowledgment or defects in its execution which made it incompetent. (*Edwards v. Simms*, 261.)
3. **APPEAL AND ERROR—AMOUNT IN CONTROVERSY—JURISDICTION—REPLEVIN.**—The supreme court has jurisdiction on appeal from a judgment in replevin, where defendant was in possession at the time suit was commenced, filed a general denial, and only asked judgment for its costs, there being nothing in the record on appeal to show that the property was out of defendant's possession, and the form of judgment indicating that it was not in plaintiff's possession, the matter in dispute being necessarily the property itself, which was valued at \$448.10. (*Gila Valley etc. Co. v. Gila County*, 292.)
4. **APPEAL AND ERROR—ASSIGNMENTS OF ERROR—FINDINGS OF FACT—MERE EXPRESSIONS OF COURT'S OPINION NOT REVIEWABLE.**—Error predicated upon alleged findings which are mere expressions taken from the trial court's opinion, and not the findings of fact, which were signed by the judge and became the basis of the judgment, will not be reviewed. (*Upton v. Weisling*, 298.)
5. **APPEAL AND ERROR—ASSIGNMENTS OF ERROR—MUST RELATE SOLELY TO THE CASE APPEALED.**—On appeal in an action to set aside a judgment assignments of error alleged to have been committed in the trial of the action sought to be set aside cannot be considered. (*MacRitchie v. Stevens*, 410.)
6. **APPEAL AND ERROR—BOND—TIME OF FILING—JURISDICTION.**—Where the record discloses that an appeal-bond was not filed within twenty days after the term at which judgment was rendered, the supreme court has no jurisdiction, and the appeal must be dismissed, even though the defect was not called to the court's attention until on rehearing. (*Shattuck v. Costello*, 255.)
7. **APPEAL AND ERROR—CRIMINAL LAW—RAPE—CONFLICT IN EVIDENCE—VERDICT—WILL NOT BE DISTURBED—TERRITORY V. MIRAMONTEZ, 4 ARIZ. 179, 36 PAC. 35; ANDERSON V. TERRITORY, 6 ARIZ. 185, 56**

APPEAL AND ERROR (Continued).

- PAC. 717; *DICKSON v. TERRITORY*, 6 ARIZ. 199, 56 PAC. 971, FOLLOWED.—Where there is a substantial conflict in the evidence between the prosecutrix and the defendant and his accomplice in a prosecution for rape, and no attack was made upon the credibility of prosecutrix aside from those contradictions, and no motive for perjury shown, the verdict will not be disturbed on appeal. (*Trimble v. Territory*, 273.)
8. **APPEAL AND ERROR—CROSS-APPEAL—ASSIGNMENT OF CROSS-ERROR NECESSARY.**—Objections by appellee cannot be considered without an assignment of cross-error unless the error complained of appears upon the face of the record. (*Arizona & New Mex. Ry. Co. vs. Nevitt*, 56.)
 9. **APPEAL AND ERROR—EVIDENCE—CONFLICTING—FINDING—WILL NOT BE DISTURBED.**—Where the evidence is conflicting, and there is any evidence to support a finding, it will not be disturbed on appeal. (*Taggart Mercantile Co. v. Clack*, 295.)
 10. **APPEAL AND ERROR—EVIDENCE—OBJECTIONS—PRESUMPTION—INCOMPETENT EVIDENCE DISREGARDED WHERE COMPETENT EVIDENCE SUPPORTS JUDGMENT—UNITED STATES v. MARKS, 5 ARIZ. 404, 52 PAC. 773, FOLLOWED.—Where the record shows that objections were interposed on the trial to the admissibility of certain documents offered in evidence, and fails to show what of said proffered evidence was considered by the court, or what excluded, in reaching its decision, it will be presumed that the incompetent evidence was disregarded, if the competent evidence in the record sustains the judgment. (*Seaverns v. Costello*, 308.)**
 11. **APPEAL AND ERROR—EVIDENCE—WEIGHT OF EVIDENCE—WILL NOT BE DISTURBED.**—Where the burden of proof to establish a given fact is upon a party, unless the evidence is such as to prove clearly and conclusively the fact for which it was offered, the finding of the trial court against the establishment of such fact will not be disturbed on appeal. (*Howard v. Perrin*, 347.)
 12. **APPEAL AND ERROR—FINDINGS—EVIDENCE—SUFFICIENCY—REVIEW.**—Sufficient evidence appearing in the record to support the findings of the lower court, they will not be disturbed on appeal. (*Costello v. Friedman*, 215.)
 13. **APPEAL AND ERROR—FINDING—SUFFICIENCY OF EVIDENCE—REVIEW—BARTER v. PIMA COUNTY, 2 ARIZ. 88, 11 PAC. 62; *JORDAN v. DUKE*, 4 ARIZ. 278, 53 PAC. 197; *WEBBER v. KASTNER*, 5 ARIZ. 324, 53 PAC. 207; *JORDAN v. SCHUERMAN*, 6 ARIZ. 79, 53 PAC. 579, FOLLOWED.—A finding by the court below will not be disturbed if there is any evidence fully tending to support it. (*Willard v. Carrigan*, 70.)**
 14. **APPEAL AND ERROR—FINDINGS—SUPPORTED BY EVIDENCE—WILL NOT BE DISTURBED—REVIEW.**—Where there is any evidence fairly tend-

APPEAL AND ERROR (Continued).

ing to support the findings of the trial court as to the facts, such findings will not be disturbed by the appellate court. (*Abernathy v. Reynolds*, 173.)

15. **SAME—EVIDENCE—IMMATERIAL—TRIAL WITHOUT JURY—HARMLESS ERROR.**—It is not ground for a reversal of a judgment that a trial court, sitting without a jury, admitted evidence which was immaterial, unless it appears that the determination of the court, in some degree at least, was based on such evidence. (*Abernathy v. Reynolds*, 173.)
16. **SAME—SAME—REBUTTAL—MATTER COVERED IN EXAMINATION IN CHIEF.**—Error cannot be predicated upon the refusal of the court to receive testimony offered by plaintiff in rebuttal, where the record shows not only that no ruling was made by the court excluding any answer to any specific question, but that the whole matter was explained by plaintiff in his examination in chief. (*Abernathy v. Reynolds*, 173.)
17. **SAME—SAME—IMPEACHMENT—FAILURE TO LAY FOUNDATION.**—In an action brought to establish the title of plaintiff to a one-half interest in a certain mining claim, the wife of plaintiff testified to conversations she had heard between plaintiff and defendant. A witness for the defendant testified to a conversation which he had with plaintiff, which tended to show that plaintiff knew witness had a bond and lease on the mining claim in question, which he had obtained from the defendant, and that plaintiff made no claim to the property. Plaintiff then offered to prove by his wife that defendant's witness came to her after he had taken a bond on the claim and wanted to buy it. This was excluded. *Held*, that such testimony was only competent as tending to impeach defendant's witness, and, no foundation for such impeachment having been laid, the testimony was properly excluded. (*Abernathy v. Reynolds*, 173.)
18. **APPEAL AND ERROR—INTERVENTION—RIGHT OF APPEAL—ONLY APPLIES TO PARTIES TO SUIT—PERSON DENIED PERMISSION TO INTERVENE NOT A PARTY—REV. STATS. ARIZ. 1887, TIT. XIV, CHAP. 2, AND TIT. XV, CHAP. 20, CONSTRUED—SPICER v. SIMMS, 6 ARIZ. 347, 57 PAC. 610, CITED.**—An appeal does not lie from an order denying a motion for leave to intervene, the petitioner not being a party to the suit, as the right of appeal granted by the statutes, *supra*, extends only to parties. (*Cobre Grande Copper Co. v. Greene*, 98.)
19. **SAME—SAME—PETITION TO INTERVENE—MERELY MOTION—DENIAL OF—NOT APPEALABLE.**—The petition for leave to intervene is only a motion in the cause to which it relates, and not an independent suit which is appealable. (*Cobre Grande Copper Co. v. Greene*, 98.)
20. **APPEAL AND ERROR—JUDGMENT—DEFAULT—REV. STATS. ARIZ. 1901, PAR. 1473, CONSTRUED.**—Paragraph 1493, *supra*, providing that "an

APPEAL AND ERROR (Continued).

appeal or writ of error may be taken to the supreme court from any final judgment of the district court, rendered in civil cases . . . which the supreme court has jurisdiction to review," does not authorize an appeal or writ of error by a defendant against whom there has been entered a judgment by default. (*McLean v. Territory*, 195.)

21. ~~SAME—SAME—SAME—PROCESS—SERVICE BY PUBLICATION—MOTION—~~
~~TO SET ASIDE—FOR NEW TRIAL—JURISDICTION—REV. STATS. ARIZ.~~
1901, PARS. 1342, 1480, CITED.—Paragraph 1342, *supra*, provides that "Where any defendant shall appear specially in any court in this territory for the sole and only purpose of objecting to the jurisdiction of the court, whether said objection be sustained or denied, such appearance shall not be held to be a general appearance or to give the court jurisdiction." Paragraph 1480, *supra*, provides that "In cases in which judgment has been rendered on service by publication, where the defendant has not appeared in person or by an attorney of his own selection, a new trial may be granted by the court, upon the application of the defendant, for good cause shown, supported by affidavit filed within one year after rendition of such judgment." Where judgment by default has been rendered on service of process by publication, defendants not having appeared, their remedy is to appear specially under paragraph 1342, *supra*, or to move for a new trial as provided in paragraph 1480, *supra*, and not by writ of error, the supreme court having no jurisdiction in such case. (*McLean v. Territory*, 195.)
22. ~~APPEAL AND ERROR—JUDGMENT—FINDINGS—EVIDENCE—CONFLICT—~~
~~REVIEW.~~—The findings and judgment of the lower court based on conflicting testimony, there being substantial evidence to support them, will not be disturbed on appeal. (*De Mund Lumber Co. v. Stilwell*, 1.)
23. ~~SAME—ASSIGNMENT OF ERROR—SUFFICIENCY—SUPREME COURT RULE~~
No. 6.—An assignment of error, that the court erred in denying the defendant's motion for a new trial without stating the grounds on which the motion was based, is insufficient to raise the question of the correctness of the ruling, it not being in compliance with supreme court rule No. 6. (*De Mund Lumber Co. v. Stilwell*, 1.)
24. ~~SAME—SAME—REVIEW—SCOPE.~~—The appellate court will only examine the record to see that the judgment follows the pleadings, upon an assignment of error that the judgment is contrary to the law, without stating wherein it is so contrary. (*De Mund Lumber Co. v. Stilwell*, 1.)
25. ~~APPEAL AND ERROR—NATURE OF PROCEEDING—NOT CHANGED BY AP-~~
~~PEAL—TRIAL BY JURY—NO RIGHT TO ON APPEAL—WHERE NOT A~~
~~MATTER OF RIGHT IN ORIGINAL ACTION—REV. STATS. ARIZ. 1887,~~
PAR. 1305, CONSTRUED.—Under the statute, *supra*, requiring that

APPEAL AND ERROR (Continued).

"all causes removed by appeal to the district court shall be tried anew as if originally brought in such court," the nature of the proceeding is not changed by an appeal; and as a jury trial is not a matter of right in the probate court, it is not error for the district court to deny a demand for a jury trial. (*Estate of Roarke*, 16.)

26. **APPEAL AND ERROR—RECORD—ABBREVIATED BY STIPULATION—EVIDENCE IN RECORD—NOT PRESUMED TO BE ALL THAT WAS INTRODUCED.**—Where, by stipulation, the record on appeal was restricted to certain papers, there being no bill of exceptions and no statement of facts or transcript of the evidence, and the judgment recites that witnesses were sworn and testified in behalf of the respective parties, and documentary evidence was introduced and filed, it cannot be assumed that the exhibits and the written stipulation contained in the record constitute all the evidence which the trial court had before it in rendering its judgment. (*Curtis v. Boquillas Land etc. Co.*, 258.)
27. **SAME—SAME—SAME—QUESTION PRESENTED.**—Where, by stipulation, an abbreviated record was presented on appeal, which was restricted to the judgment-roll, the motion for a new trial and the ruling thereon, a written stipulation as to a part of the evidence of the defendants in the action, certain exhibits, bond on appeal, assignment of errors, and an admission that plaintiff, a corporation, was authorized to do business in the territory, such record presents no matter for the consideration of the appellate court, except the one question, whether the pleadings support the judgment. (*Curtis v. Boquillas Land etc. Co.*, 258.)
28. **APPEAL AND ERROR—RECORD—RULES OF SUPREME COURT.**—There is such a failure to comply with the supreme court rules as to warrant a refusal to consider questions presented for review, where there is no abstract of record, bill of exceptions, statement of facts, or proper transcript of the record filed, and the only papers before the court besides the briefs of counsel, are the original papers in the case, together with the minute entries and the reporter's transcript of the testimony (*Brady v. County of Pinal*, 114.)
29. **SAME—ASSIGNMENT OF ERROR—GROUNDLESS.**—An assignment of error that "The court erred in overruling defendant's demurrer which alleged, among other things, a defective nonjoinder of parties defendant," is groundless, where it appears from the pleadings that no demurrer was filed, but that by answer the point was raised. (*Brady v. County of Pinal*, 114.)
30. **SAME—PLEADING—AMENDMENT UPON TRIAL—DISCRETIONARY—REVIEW—ABUSE OF DISCRETION.**—The refusal to allow an amendment to the pleadings near the close of the trial of the case is a

APPEAL AND ERROR (Continued).

matter clearly within the discretion of the court, and its ruling will not be disturbed on appeal, unless it appears that such discretion has been abused. (*Brady v. County of Pinal*, 114.)

See *Condemnation Proceedings*, 5; *Criminal Law*, 8; *Elections*, 4, 5; *Prohibition*, 1; *Texas and Taxation*, 11, 13.

APPROPRIATION. See *Water and Water-Rights*, 1, 5, 7, 8, 9, 10, 16.

ASSAULT WITH DEADLY WEAPON. See *Criminal Law*, 1.

ASSESSMENT.

Illegal, no remedy for prior to 1901. See *Taxes and Taxation*, 11.

ASSIGNMENTS OF ERROR.

Groundless. See *Appeal and Error*, 29.

Must relate solely to the case appealed. See *Appeal and Error*, 5.

See *Appeal and Error*, 4, 23, 24.

ATTACHMENT.

1. **ATTACHMENT—DEATH OF DEFENDANT—ABATEMENT—LIEN—FORECLOSURE—REV. STATS. ARIZ. 1887, PARS. 67, 68, 725, CONSTRUED.**—Paragraph 67, *supra*, provides that “the execution of the writ of attachment upon any property of the defendant subject thereto . . . shall create a lien from the date of such levy on the real estate levied on. . . .” Paragraph 68, *supra*, provides that “should the plaintiff recover in the suit, the court shall direct . . . the sale . . . of the real estate levied on to satisfy the judgment.” Under these statutes, the attachment proceeding becomes an integral part of the action, and the provisions of paragraph 725, *supra*, providing that an action shall not abate by the death or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue, apply, and embrace the foreclosure of the lien as well as the cause of action. (*Wartman v. Pecka*, 8.)

See *Executors and Administrators*, 1; *Statutory Construction*, 1.

ATTEMPT TO ROB MAILS. See *Criminal Law*, 2.

ATTORNEY AND CLIENT.

1. **ATTORNEY AND CLIENT—LEGAL SERVICES—FEES—ACTION—MOTION TO DISMISS.**—In an action by an attorney to recover for legal services, a motion to dismiss, made at the close of the plaintiff's case, upon the ground that there was no evidence against the defendant, is properly denied where the record shows that the allegations that

ATTORNEY AND CLIENT (Continued).

the defendant employed plaintiff as attorney, that plaintiff rendered such services, and that such services were reasonably worth two hundred and fifty dollars, were supported by the direct testimony of the plaintiff, and that there was additional testimony as to the value of the services. (*De Mund Lumber Co. v. Stilwell*, 1.)

BALLOTS. See Elections, 2, 3, 4.

BENEFITS. See Condemnation Proceedings, 2.

BILL OF EXCEPTIONS. See Appeal and Error, 1; Elections, 4, 5.

BOARD OF EQUALIZATION. See Taxes and Taxation, 1, 2, 3.

BOARD OF SUPERVISORS.

Power to destroy property to prevent spread of contagion. See Counties, 1.

BONDS.

1. **BONDS—EVIDENCE.**—In an action against the principal and co-obligors on the bond of a United States marshal, the trial court properly refused to receive as proof of the liability of the sureties the pleadings, record, and judgment in an action in the court of claims, wherein the United States had secured judgment against the marshal, there being nothing contained therein tending to show that the items for which the judgment had been rendered against the marshal were for items chargeable against him during the life of the bond. (*United States v. Meade*, 367.)
2. **SAME — PLEADING — EVIDENCE.**—Where the complaint against the sureties on a United States marshal's bond alleged that the United States obtained judgment against the marshal for a certain amount advanced by the government to him during the life of the bond, and that this had not been paid, and prayed judgment for this amount, the plaintiff was limited in the proof properly adducible by it as against the defendants to such proof as would establish a judgment as pleaded in the complaint, and no evidence of liability under the bond independent of the judgment was admissible. (*United States v. Meade*, 367.)
3. **BONDS—OFFICIAL—HOW CONSTRUED.**—All bonds given by government officials are to be construed as though executed and to be performed at Washington, and hence are to be construed according to the rules of the common law, except where these rules have been changed or modified by statutes. (*United States v. Griswold*, 453.)
4. **BOND—OFFICIAL—PLEADING—PARTIES.**—Where suit is brought by the United States on a postmaster's bond to recover the value of regis-

BONDS (Continued).

tered mail matter lost through his negligence, it is unnecessary for the pleadings to state that the suit is for the use of the sender of such registered matter, it being sufficient if it appears that the United States is suing to recover the loss suffered by the sender. (United States v. Griswold, 453.)

See Appeal and Error, 6; Office and Officers, 1; Postmaster. 1, 2, 3.

BROKERS.

1. **BROKERS—COMMISSION—CONTRACTS—CONSIDERATION.**—An agreement entered into at the time of purchase after the services were rendered between the purchaser, the seller, and an agent claiming commissions for procuring for the seller a purchaser, that the purchaser and seller would pay the commissions, is not supported by a valid consideration as against the purchaser. (Wulff v. Lindsay, 168.)
2. **SAME—SAME—SAME—WRITTEN—CANNOT BE VARIED BY PAROL TESTIMONY—ADAMS V. O'CONNOR, 6 ARIZ. 404, 59 PAC. 105; BURMISTER V. EMPIRE GOLD ETC. CO., ANTE, p. 158, 71 PAC. 961, CITED.**—An agreement providing that defendant should pay plaintiff a certain commission on any sale "made through him, or to pay the same percentage on any sale made through a certain bond or agreement made to Robert Hennigan of this date on certain mining properties in said agreement in Ures District, state of Sonora, Mexico," will not sustain an action for commission on a sale made through plaintiff of mines situated in the district of Arispe. (Wulff v. Lindsay, 168.)
3. **BROKERS—COMMISSIONS—STATUTE OF FRAUDS—CONTRACTS.**—An agreement by a purchaser to pay an agent the sum claimed to be due from the seller as commission for procuring a purchaser, not being in writing, is void under the statute of frauds. (Wulff v. Lindsay, 168.)
4. **BROKERS—OPTION CONTRACT—EXPIRATION—SUBSEQUENT SALE.**—Where the owner of an interest in a mine agreed to give plaintiff a certain commission for selling same, and a prospective purchaser was secured, who took an option on the interest for a certain period, the owner depositing a deed in escrow, but the owner died before the expiration of the option, and the deed, on the failure of the purchaser to make payment, was returned to his administrator, who subsequently sold the interest to the same purchaser at the same price but on different terms, the administrator was not liable to plaintiff for the commission agreed on in the contract with decedent. (Trickey v. Crowe, 176.)

See Pleading and Practice, 2.

BURDEN OF PROOF.

Identity of ballots in election contest. See Elections, 3.

See Mines and Mining, 3, 5; Trusts, 1; Water and Water-Rights, 17.

CANAL. See Water and Water-Rights 14.

CANAL COMPANY. See Water and Water-Rights, 2, 6, 11, 12, 13.

CERTIFICATES. See Aliens, 1, 2, 3, 4, 5.

CHARGE TO JURY. See Criminal Law, 25, 26; Ejectment, 3.

CHINESE EXCLUSION ACTS. See Aliens, 1, 2, 3, 4, 5.

CLAIMANTS. See Public Lands, 3.

COMMISSION. See Brokers, 1, 2, 3; Pleading and Practice, 2.

COMPENSATION.

For improvements. See Partition, 1.

COMPLAINT.

Must show plaintiff's right. See Eminent Domain, 6.

Sufficiency. See Mandamus, 4; Water and Water-Rights, 14.

See Mechanics' Liens, 1; Pleading and Practice, 2; Taxes and Taxation, 5, 6, 7, 8.

CONDEMNATION PROCEEDINGS.

1. CONDEMNATION PROCEEDINGS—EVIDENCE—DAMAGES—HARMLESS ERROR.—The exclusion of the opinion of defendant's witness as to the value of the mine in a condemnation proceeding, if error, is harmless where two other of defendant's witnesses have clearly testified that the value was as alleged in the answer, and no issue is raised as to such value. (Marks v. The Bradshaw etc. R. R. Co., 379.)
2. SAME—SAME—BENEFITS—HARMLESS ERROR.—The admission of evidence in condemnation proceedings, that defendant's property had been benefited, if error, is harmless, the finding of the jury being that there were neither damages nor benefits. (Marks v. The Bradshaw etc. R. R. Co., 379.)
3. SAME—FINDINGS—VALUE—PROPERTY ACTUALLY TAKEN—WAIVER.—Although the owner of land sought to be condemned for a right of way is entitled to the full value of the land actually taken, a finding that such land had no value is warranted where defendant,

CONDEMNATION PROCEEDINGS (Continued).

upon the trial before the jury, expressly waives the right to recover for the strip taken. (*Marks v. The Bradshaw etc. R. R. Co.*, 379.)

4. SAME—INJURIES TO LAND NOT TAKEN—FINDINGS—SUPPORTED BY EVIDENCE—WILL NOT BE DISTURBED.—While in condemnation proceedings the owner is entitled to compensation for injuries resulting from the construction of a railroad to the portion of the land not taken, the verdict of the jury that no injury had been suffered will not be disturbed where there is substantial evidence to support it. (*Marks v. The Bradshaw etc. R. R. Co.*, 379.)
5. SAME—CONSTITUTIONAL LAW—APPEAL AND ERROR—NEW QUESTION ON APPEAL.—A question as to the constitutionality of a statute allowing plaintiff in condemnation proceedings to enter before decree, and fixing the damages therefor at ten per cent of the award, cannot be raised by the defendant for the first time on appeal, it only affecting that portion of the act relating to possession before final decree, and having no effect upon the subsequent proceedings, and being entirely immaterial where no verdict for damages was returned. (*Marks v. The Bradshaw etc. R. R. Co.*, 379.)

CONSIDERATION.

Past. See Contracts, 1.

See Brokers, 1; Homestead, 2.

CONSTITUTIONAL LAW.

1. CONSTITUTIONAL LAW—ANIMALS—TRESPASSING—SALE FOR DAMAGES—DUE PROCESS OF LAW—LAWS ARIZ. 1893, P. 32, ACT NO. 41, SEC. 4 ET SEQ., HELD VOID—REV. STATS. U. S., SEC. 1851, (ORGANIC ACT, REV. STATS. ARIZ. 1901, PAR. 15), CITED.—Act No. 41, *supra*, providing for no-fence districts, and making it unlawful for any animal to run at large therein, and providing in section 4 and subsequent sections that the owner of any property may detain all animals doing damage on such property and turn them over to a poundkeeper, and if the damages, costs, and expenses of keeping the animals are not paid and the animals claimed within ten days after the posting of certain notices therein provided, the poundkeeper shall sell such animals at public auction to the highest bidder, the proceeds of the sale, after deducting damages, costs, and expenses, to be deposited to the credit of the county school fund, is repugnant to the constitution and void, as a deprivation of property without due process of law, in so far as it authorizes a seizure and sale and a payment of a private claim for damages for trespass without judicial proceedings to determine the amount of damages or whether the animals were in fact running at large within the meaning of the act. (*Greer v. Downey*, 164.)

CONSTITUTIONAL LAW (Continued).

2. CONSTITUTIONAL LAW—CRIMINAL LAW—FOREST RESERVES—PRIVATE USE—RULES AND REGULATIONS OF SECRETARY OF INTERIOR—INFRACTION OF—NOT CRIMINAL—ACT OF CONGRESS, JUNE 4, 1897, 30 STATS. 33, UNCONSTITUTIONAL—ACT OF CONGRESS, JUNE 4, 1888, 25 STATS. 166, AMENDING REV. STATS. U. S. SEC. 5388, CITED.—The act of Congress of June 4, 1897, *supra*, providing that the secretary of the interior may make rules and regulations to regulate the occupancy and use of forest reservations and to preserve the forests thereon, and further providing that any violation of such rules and regulations shall be punished as is provided for in the act of Congress of June 4, 1888, amending section 5388 of the Revised Statutes of the United States, is an unconstitutional delegation of legislative power to the secretary of the interior in so far as it authorizes him by rule or regulation to specify acts the performance of which shall constitute crime. (*Dent v. United States*. 138.)
3. SAME—SAME—SAME—SAME—SAME—CRIME—WHAT CONSTITUTES.—It is not enough that the government may have the ownership of the forest reserves, and that its unauthorized use for sheep-grazing be a trespass. There being no offenses against the government at common law, special statutory enactment making the use an offense must be had before a regulation of a department officer can make such use a criminal act; and such a statutory enactment is not to be found in a statute which gives such official the right to make regulations for use, and provides for a punishment for the infraction thereof, unless such use, except as allowed by the regulations, is in terms prohibited. (*Dent v. United States*. 138.)
4. CONSTITUTIONAL LAW—CRIMINAL LAW—FOREST RESERVES—PRIVATE USE—RULES AND REGULATIONS OF SECRETARY OF INTERIOR—INFRACTION OF—CRIMINAL—ACT OF CONGRESS OF JUNE 4, 1897, 30 STATS. 33, CONSTITUTIONAL—ACT OF CONGRESS OF JUNE 4, 1888, 25 STATS. 166, AMENDING REV. STATS. U. S., SEC. 5388, CITED.—The act of Congress of June 4, 1897, *supra*, providing that the secretary of the interior may make rules and regulations to regulate the occupancy and use of forest reservations and to preserve the forests thereon, and further providing that any violation of such rules and regulations shall be punished as is provided for in the act of Congress of June 4, 1888, amending section 5388 of the Revised Statutes of the United States, is not an unconstitutional delegation of power to the secretary of the interior. (*Dent v. United States*, 413.)

See Condemnation Proceedings, 5; Eminent Domain, 2; Justice of the Peace, 1.

CONSTRUCTION. See Written Instrument, 1.

CONTEST. See Elections, 2, 3, 4, 5.

CONTRACTS.

1. **CONTRACTS—PAST CONSIDERATION.**—Services rendered in the past, without express or implied request of the person benefited by them, will not support a subsequent oral promise to pay for them. (*Wulff v. Lindsay*, 168.)

Option. See *Brokers*, 4.

To compensate owner of property destroyed to prevent spread of contagion. See *Counties*, 1.

Written, cannot be varied by parol evidence. See *Brokers*, 2.

See *Brokers*, 1, 3; *Pleading and Practice*, 2; *Sale*, 1, 2.

CONTRIBUTORY NEGLIGENCE. See *Railroads*, 1.

CONVEYANCE.

1. **CONVEYANCE—ACTION TO SET ASIDE—FRAUD—PLEADING—ALLEGATIONS—SUFFICIENCY—MINES AND MINING.**—In an action to set aside a conveyance of plaintiff's one-third interest in a mining claim, the complaint alleged specific fraudulent acts on the part of plaintiff's co-owners, and that defendant, the purchaser, was a party to and cognizant of all the fraudulent acts, misrepresentations, and deceit done, said, and practiced upon said plaintiff by his co-owners and parties interested therein, and that by reason of such fraudulent act plaintiff was induced to make the conveyance. *Held*, that the complaint stated a cause of action against the purchaser, and his demurrer thereto was properly overruled. (*Upton v. Weisling*, 298.)

2. **CONVEYANCE — DEED—VERBAL AGREEMENT OF SURRENDER.**—Where premises were conveyed in consideration of the execution of certain notes the title to the property vested in the grantees, and a mere subsequent verbal agreement for the surrender of the notes and the deed, not carried into effect by the actual surrender of the deed, does not operate to revest the title in the grantor. (*Goodwin v. Tyrrell*, 238.)

Agreement to assume mortgage, not binding when mortgage void.

See *Homestead*, 2.

By one spouse. See *Homestead*, 1.

CORPORATIONS.

1. **CORPORATIONS—RECEIVER—DENIED.**—No ground for the appointment of a receiver is shown where the only property of the corporation within the jurisdiction of the court is funds in the treasurer's hands acquired by the company by virtue of an agreement the invalidity of which constitutes the ground of plaintiffs' cause of action. (*Hallenborg v. Cobre Grande etc. Co.*, 329.)
2. **SAME—SAME—SAME.**—Where it appears that the only purpose which would be subserved by the appointment of a receiver, in an action

CORPORATIONS (Continued).

brought by minority stockholders of a corporation, would be the bringing of suits on behalf of the corporation, the appointment of a receiver is properly denied, since the minority stockholders have authority to institute the actions without the interposition of a receiver. (*Hallenborg v. Cobre Grande etc. Co.*, 329.)

3. **SAME—SAME—SAME.**—That a receiver being in possession of the books and records of a corporation would be in a better position to prosecute actions on its behalf than a stockholder who might be denied an inspection thereof affords no sufficient ground for the appointment, since the courts are not loath to permit inspection of records to stockholders in suits properly instituted by them. (*Hallenborg v. Cobre Grande etc. Co.*, 329.)

See Criminal Law, 3; Injunctions, 1; Water and Water-Rights, 2, 11, 12.

CORPUS DELICTI.

Two elements of. See Criminal Law, 14, 15.

See Criminal Law, 18.

COTENANT. See Partition, 1.

COUNSEL.

Appointment of, to represent absent heirs. See Probate Court, 1, 2, 3.

COUNTIES.

1. **COUNTIES—BOARD OF SUPERVISORS—POWER—SANITARY REGULATIONS—CONTAGION—DESTRUCTION OF PROPERTY TO PREVENT SPREADING—COMPENSATION TO OWNER OF PROPERTY DESTROYED—CONTRACT—REV. STATS. ARIZ. 1887, PARS. 381, 383, 397, SECS. 19, 25, CONSTRUED.**—Paragraph 381, *supra*, provides that "every county is a body politic and corporate, and as such has the power specified in this act and such powers as are necessarily implied from those expressed." Paragraph 383, *supra*, declares that these powers "can only be exercised by the board of supervisors, or by agents and officers acting under their authority, or authority of law." Paragraph 397, *supra*, empowers the board (Sec. 19) to adopt "such provisions for the preservation of the health of their respective counties as they may deem necessary, and provide for the expenses thereof," . . . (Sec. 25) "to make and enforce all such local, police, sanitary, and other regulations as are not in conflict with general laws." Under these statutes a county is liable for a house, and the goods therein, taken by order of the board of supervisors and destroyed under an agreement by the board to reimburse the owner, such action being deemed necessary after consultation with a

COUNTIES (Continued).

physician to prevent the spread of a contagious disease. (*Haupt v. Maricopa County*, 102.)

2. **COUNTIES—LOCAL SUBDIVISIONS OF TERRITORY FOR GOVERNMENTAL PURPOSES—DUTIES—LIABILITIES.**—A county is the local subdivision of a state or territory created by the state for the purposes of government, its functions, political and administrative, having direct relation to the policy of the state. It is possessed of only such powers as the state chooses to give it, can incur no liability except in pursuance of law, and cannot be made to respond for wrongs committed by its officers or agents unless the statute so declares. (*Haupt v. Maricopa County*, 102.)
3. **COUNTY—NAME—BRADY v. TERRITORY**, 7 ARIZ. 12, 60 PAC. 698, FOLLOWED.—“Pinal County” and “County of Pinal” are used interchangeably in the statutes, and either form is a sufficient legal description. (*Brady v. County of Pinal*, 114.)

See *Mandamus*, 2.

COUNTS. See *Pleading and Practice*, 2.

COUNTY SEATS.

Not necessarily largest towns. See *Courts*, 1.

COURTS.

1. **COURTS—JUDICIAL NOTICE—COUNTY SEATS—NOT NECESSARILY LARGEST TOWNS.**—The court takes judicial notice of the fact that all the county seats of the territory are not situated in the largest towns and centers of population. (*Maricopa County v. Burnett*, 242.)
2. **COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.**—Where in good faith suit was commenced for an amount within the jurisdiction of the court, and at defendant's instance allegations were stricken from the complaint, thereby reducing the amount in controversy to a sum less than the statutory amount, it was error for the court to dismiss the action on the ground that the amount in controversy was below the jurisdictional limit. (*Burmister v. The Empire Gold etc. Co.*, 158.)

CRIME.

What constitutes. See *Constitutional Law*, 3.

CRIMINAL LAW.

1. **CRIMINAL LAW—ASSAULT WITH DEADLY WEAPON—EVIDENCE—CIRCUMSTANTIAL—SUFFICIENCY.**—Defendant went to the house of De Grazia and called to De Grazia to come out. De Grazia's son came

CRIMINAL LAW (Continued).

to the door and asked, "What do you want?" Defendant replied, "Tell your father to come out. I want to kill him." The boy replied that his father was changing his clothes, whereupon defendant said, "You come out." The son stepped out, and then defendant said, "If I can't get your father, I will get you," and immediately pulled a pistol, fired at the boy, and then turned and ran. Defendant stood forty feet from the boy when he fired. No one was hit, nor was any mark of a bullet found. *Held*, that the declaration of the defendant that he intended to kill the boy, followed by the act of firing the pistol and his flight, were circumstances from which the jury might reasonably have inferred that the pistol was loaded. (*Mazzotte v. Territory*, 270.)

2. CRIMINAL LAW—ATTEMPT TO ROB MAILS—INDICTMENT—INTENT—SUFFICIENCY—DEFECT OF FORM—CURED BY VERDICT—REV. STATS. U. S., SEC. 5473, AND REV. STATS. ARIZ. 1887, PAR. 1467, CITED AND CONSTRUED.—Section 5473, *supra*, provides that "Any person who shall attempt to rob the mail by assaulting the person having custody thereof, by shooting at him . . . or threatening him with dangerous weapons, and shall not effect such robbery, shall be punishable," etc. Paragraph 1467, *supra*, provides: "No indictment or information is insufficient, nor can the trial, judgment, or other proceedings thereon, be affected, by reason of any defect or imperfection in matter of form, which does not tend to the prejudice of the substantial rights of the defendant upon its merits." The indictment charged that defendant "did unlawfully, willfully, and feloniously attempt to rob the United States mail, . . . by then and there assaulting [the custodian] with a dangerous weapon and threatening to kill [said custodian]." The court instructed the jury that the attempt must have been made with an intent to steal, before they could find the defendant guilty. *Held*, that although the indictment might have been held insufficient on demurrer in not alleging the intent with sufficient clearness, yet such insufficiency was a defect of form within paragraph 1467, and cured by verdict. (*Downing v. United States*, 31.)
3. CRIMINAL LAW—CORPORATION—OFFICER FALSIFYING BOOKS—INDICTMENT—SUFFICIENCY—DUPLICITY—REV. STATS. ARIZ. 1887, PEN. CODE, PAR. 881, CITED.—Under paragraph 881, *supra*, providing for the punishment of any officer of a corporation who, with intent to defraud said corporation or its stockholders, destroys, alters, mutilates, or falsifies any of the books, papers, writing, or securities of said corporation, an indictment charging that defendant did "alter, mutilate, and falsify and cause to be altered, mutilated, and falsified a book in writing" belonging to said corporation, and then setting out the one alteration complained of, is good, it being unnecessary to state the name of the person whom the defendant caused to alter the record. While it may have been unnecessary

CRIMINAL LAW (Continued).

to have charged the offense as having been done and caused to be done by the defendant, the language used, taken in connection with its context, is not open to the objection that two offenses are therein charged. (*Qualey v. Territory*, 45.)

4. SAME—TRIAL—CHARGE TO JURY—SETTING OUT WHOLE STATUTE—SPECIFIC CHARGE—REV. STATS. ARIZ. 1887, PEN. CODE, PAR. 881, CITED.—Upon the trial of a defendant, president of a corporation, charged with falsifying its records in violation of paragraph 881, *supra*, an instruction to the jury setting out the entire statute is not erroneous where the court elsewhere in its charge specifically stated to the jury the precise charge made against the defendant in the indictment. (*Qualey v. Territory*, 45.)
5. SAME—EVIDENCE—ADMISSIBILITY—OTHER ACTS—GOOD FAITH—MOTIVE—REV. STATS. ARIZ. 1887, PEN. CODE, PAR. 881, CITED.—Upon the trial of a defendant charged with having falsified the records of the corporation, of which he was an officer, in violation of paragraph 881, *supra*, evidence of alterations and erasures in part of the record other than charged in the indictment is admissible as bearing upon the good faith of defendant and tending to establish the motive on his part for the commission of the offense charged. (*Qualey v. Territory*, 45.)
6. SAME—SAME—IMPEACHMENT—HARMLESS ERROR—SNEAD V. TIETJEN, 3 ARIZ. 195, FOLLOWED.—While it may have been erroneous for the court to have sustained objections to questions asked by defendant's counsel, seeking to lay the foundation for impeachment, as to prior conversations by the witness, such error is harmless where the record fails to disclose that defendant offered any impeaching testimony as to such prior conversations. (*Qualey v. Territory*, 45.)
7. CRIMINAL LAW—INDICTMENT—DUPLICITY—REV. STATS. ARIZ. 1887, PEN. CODE, PAR. 969, AND REV. STATS. ARIZ. 1901, PEN. CODE, PARS. 824, 826, CITED.—Paragraph 969, Penal Code, *supra*, declares any person to be guilty of a felony "who shall brand and mark or cause to be branded and marked with his brand or any other brand, not the recorded brand of the owner, any animal being the property of another, or who shall efface, deface, or obliterate any brand or mark upon any animal with intent to feloniously convert the same to his own use." Paragraph 824, *supra*, provides: "The indictment must contain: . . . 2d. A statement of the acts constituting the offense in ordinary and concise language." Paragraph 826, *supra*, provides: "The indictment must be direct and certain as it regards . . . 3d. The particular circumstances of the offense charged when they are necessary to constitute a complete offense." An indictment charging that defendant did willfully, unlawfully, and feloniously brand and mark certain cattle with a brand other than that of the real owner, said cattle having

CRIMINAL LAW (Continued).

been already branded with said real owner's brand, and "did then and there, by so branding, as aforesaid, the cattle aforesaid, deface, alter, and obliterate the said recorded brand of the real owner," while setting forth the details of the act and the attending circumstances with needless particularity, charges only one offense, and substantially conforms to the requirements of paragraphs 824 and 826, *supra*. (Ortega v. Territory, 37.)

8. **SAME—SAME—APPEAL AND ERROR—WAIVER OF OBJECTIONS.**—The objection that an indictment was indefinite because it charged that the offense was committed "on or about" a certain day cannot be entertained on appeal, when no motion to quash was made, and the objection was not raised by the demurrer in the lower court. (Ortega v. Territory, 37.)
9. **SAME—SAME—SUFFICIENCY—TIME—DEFINITENESS—REV. STATS. ARIZ. 1901, PEN. CODE, PAR. 829, CITED.**—Under paragraph 829, *supra*, providing that "the precise time at which the offense was committed need not be stated in the indictment, but it may be alleged to have been committed any time before the finding thereof, except where the time is a material ingredient in the offense," an indictment for unlawfully branding cattle, charging that the offense was committed on or about the first day of March, 1901, and before the finding of the indictment, is sufficient, time not being a material ingredient in the offense. (Ortega v. Territory, 37.)
10. **CRIMINAL LAW—INDIANS—INTOXICATING LIQUORS—KNOWLEDGE—INTENT—NOT ESSENTIAL ELEMENT OF OFFENSE—ACT OF CONGRESS JANUARY 30, 1897, 29 STATS. 506, C. 109, CONSTRUED.**—Under the act, *supra*, making it an offense for any person to sell, give away, or dispose of intoxicating liquors to an Indian, a ward of the government, under the charge of an Indian superintendent or agent, knowledge or intent is not an essential ingredient, and it is no defense that the defendant actually believed that the person to whom he sold was a Mexican. (United States v. Stoffelo, 461.)
11. **CRIMINAL LAW—LARCENY—DEGREES—JURY—VERDICT—MUST SPECIFY DEGREE—REV. STATS. ARIZ. 1901, PEN. CODE, SECS. 443, 444, 445, 972, 974, CONSTRUED.**—Section 443, *supra*, divides larceny into two degrees, and sections 444 and 445, *supra*, define each. Section 972 of the Penal Code, *supra*, provides that "Whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty." Section 974, *supra*, provides that "The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged or of an attempt to commit the offense." Defendant was tried under an indictment charging him with the crime of grand larceny, in the taking of property in value in excess of fifty dollars. The jury brought in a verdict of "guilty

CRIMINAL LAW (Continued).

as charged in the indictment." *Held*, that a judgment based on said verdict was unwarranted, as, under statute *supra*, the jury must by their verdict find the degree of the crime, where the crime is divided into degrees. (*McLane v. Territory*, 150.)

DAVIS, J., dissenting.

12. CRIMINAL LAW—MALICIOUS INJURY TO PRIVATE ROAD—REV. STATS. ARIZ., PEN. CODE, SEC. 524, CONSTRUED.—Section 524, *supra*, makes it punishable to maliciously injure any public highway, or "private way laid out by authority of law," but does not make it a criminal offense to commit an injury to a private way not laid out by authority of law. (*Territory v. Richardson*, 336.)
13. SAME—SAME—INDICTMENT—SUFFICIENCY—REV. STATS. ARIZ., PEN. CODE, SEC. 544, CITED—GIST OF OFFENSE.—An indictment under section 524, *supra*, for maliciously injuring a private way laid out by authority of law, is fatally defective, the allegation that defendant did maliciously "dig up a private way laid out by authority of law" being merely descriptive, and failing to aver facts showing that the way was laid out by authority of law or directly to aver that the way was so laid out by authority of law; the malicious digging up of a private way becoming a criminal offense only when such way is laid out by authority of law. (*Territory v. Richardson*, 336.)
14. CRIMINAL LAW—MURDER—CORPUS DELICTI—ELEMENTS.—In felonious homicide the *corpus delicti* consists of two elements: First, the fact of death, as the result; second, facts and circumstances showing the criminal agency of the person charged with the crime as the means. (*Edwards v. Territory*, 342.)
15. SAME—SAME—SAME—EVIDENCE—SUFFICIENCY.—Evidence reviewed and held sufficient to show that decedent was murdered and by the defendant. (*Edwards v. Territory*, 342.)
16. SAME—SAME—SAME—SAME—CIRCUMSTANTIAL—COMPETENCY—SUFFICIENCY.—There being direct proof of the death, circumstantial evidence tending to show the defendant's criminal agency is competent and is sufficient where each fact necessary to be established has been proved by competent evidence beyond a reasonable doubt. (*Edwards v. Territory*, 342.)
17. SAME—TRIAL—NEGLECT OF DEFENDANT'S COUNSEL—NOT GROUND FOR NEW TRIAL.—That the former counsel for the defendant, who tried the case in the court below, neglected to introduce evidence at hand favorable to defendant, or in other respects conducted the case in an unskillful manner, is no ground for a reversal. (*Edwards v. Territory*, 342.)
18. CRIMINAL LAW—MURDER—CORPUS DELICTI—EVIDENCE—CIRCUMSTANTIAL—SUFFICIENCY.—Defendant knocked decedent down with a ball-

CRIMINAL LAW (Continued).

club and then struck him over the head. Decedent then succeeded in getting into his wagon and drove about two miles, parties along the way seeing blood on his face and head. The affray occurred about four P. M. of October 23d, and the following morning decedent was found near the roadside in a dying condition, and thereafter and within twenty-four hours of the assault died. There was a dent along the side of his head and another in the back of it. There was a conflict of evidence as to whether defendant struck decedent two or three times. *Held*, that the evidence was sufficient to establish the death of decedent and the criminal agency of the defendant as the cause thereof. (*Gibson v. Territory*, 42.)

19. SAME—TRIAL—ARGUMENT—IMPROPER REMARKS OF COUNSEL—HARMLESS ERROR.—A remark of counsel for the prosecution in his opening argument—i. e. "Look at the defendant's face and see that he is a murderer"—is not prejudicial to the defendant where the court upon objection thereto admonishes the offending counsel that his argument must be confined to the evidence in the case, that such a reference to the defendant is improper and must not be indulged in, and also instructs the jury not to consider the reference. (*Gibson v. Territory*, 42.)
20. CRIMINAL LAW — OBTAINING MONEY BY FALSE PRETENSES — WHAT CONSTITUTES.—Where an interpreter knowing of a custom of a county board of supervisors to pay fees for acting as interpreter in criminal cases before justices of the peace, knowingly and designedly obtained from the county compensation by means of false pretenses that he had rendered such service, he is guilty of obtaining money under false pretenses, and absence of statutory authority for the payment of such compensation constitutes no defense. (*Berreyesa v. Territory*, 385.)
21. CRIMINAL LAW—PRACTICE—APPEAL—REV. STATS. 1901, PEN. CODE, SEC. 1067, CONSTRUED.—No appeal can be taken from a judgment of the district court rendered in a case appealed from a justice court, such appeal being expressly prohibited by the statute, *supra*. (*Hall v. Territory*, 409.)
22. CRIMINAL LAW — RAPE — EVIDENCE—TESTIMONY OF PROSECUTRIX—SUFFICIENT TO CONVICT—CURBY V. TERRITORY, 4 ARIZ. 371, 42 PAC. 953, FOLLOWED.—Rape is not one of the offenses which requires corroborative evidence, and a conviction thereof may be had upon the testimony of the victim alone. (*Trimble v. Territory*, 273.)
23. SAME — SAME — SAME — COMPLAINT—CORROBORATION.—In a prosecution for rape, it is always competent for the prosecution to show as a part of its case that complaint was made recently after the commission of the outrage, and this fact is treated as a circumstance corroborative of the complainant's testimony. (*Trimble v. Territory*, 273.)

CRIMINAL LAW (Continued).

24. ~~SAME—SAME—SAME—SAME—LAPSE OF TIME BETWEEN ACT AND COMPLAINT—AFFECTS WEIGHT BUT NOT ADMISSIBILITY—SURROUNDING CIRCUMSTANCES—MUST BE CONSIDERED.~~—Lapse of time between the commission of the crime of rape and complaint by the prosecutrix affects the weight but not the admissibility of evidence of complaint having been made; and in considering what weight should be given to such testimony, regard should be taken of the surrounding circumstances, such as intimidation by threats, or lack of opportunity. (*Trimble v. Territory*, 273.)
25. ~~SAME—SAME—CHARGE TO JURY.~~—In a prosecution for rape the court charged that the prosecution relied upon the testimony of the prosecutrix alone; that the uncorroborated testimony of the prosecutrix, unsustained by other evidence, or by facts and circumstances corroborating it, should be viewed with great caution; that in considering her testimony the jury may take into consideration the facts and circumstances surrounding the place where the alleged offense is charged to have been committed,—all the facts and circumstances at the time and immediately after the alleged offense was committed,—in determining the weight of her testimony and the reasonableness thereof. *Held*, that such instruction was neither unfavorable nor prejudicial to the defendant. (*Trimble v. Territory*, 273.)
26. ~~SAME—SAME—SAME—WITNESSES—CREDIBILITY—RIGHT OF JURY TO DISREGARD TESTIMONY.~~—In a prosecution for rape it was not error for the court to charge the jury: "If you believe that any witness has willfully testified falsely as to any material fact in the case, you are at liberty to disregard the entire testimony of such witness, except in so far as it may be corroborated by the other evidence in the case." (*Trimble v. Territory*, 273.)
27. CRIMINAL LAW—RAPE—JUROR—PREJUDICE.—Where, after the trial and conviction of defendant for rape, one of the jurors stated in a street conversation that "he liked to sit on such cases as a jurymen, and that he liked to send such fellows as that over the road," and the said juror on his examination on his *voir dire* had sworn that he knew nothing whatever of the case, and was absolutely without bias or prejudice in the matter, there is nothing to warrant the conclusion that the verdict was influenced by bias or prejudice. (*Trimble v. Territory*, 273.)
28. CRIMINAL LAW — RAPE—PRINCIPAL—ACCESSORY—INDICTMENT—SUFFICIENCY—REV. STATS. ARIZ. 1901, PENAL CODE, SECS. 27, 230, 845, CITED.—Section 230 of the Penal Code, *supra*, defines rape to be "an act of sexual intercourse, accomplished with a female, not the wife of the perpetrator, under either of the following circumstances," among which the first is "where the female is under the age of seventeen years." Section 27, *supra*, makes all persons

CRIMINAL LAW (Continued).

concerned in the commission of a crime, whether they directly commit the act or aid and abet in its commission, principals. Section 845, *supra*, provides that "The distinction between an accessory before the fact and a principal, and principals in the first and second degree is abrogated; . . . and all persons concerned in the commission of a felony . . . shall hereafter be prosecuted, tried and punished as principals, and no other facts need be alleged in an indictment against such accessory than are required in an indictment against his principal." In a prosecution for rape an indictment charging that defendant made an assault on one S, "and did aid, abet, and assist one W. T. to unlawfully and feloniously ravish and carnally know her, the said S., and to unlawfully and feloniously accomplish an act of sexual intercourse with said S., she not being his wife," fails to allege that W. T. in fact committed the crime of rape, and therefore charges no substantive offense punishable by the laws of this territory. (*Trimble v. Territory*, 281.)

See Appeal and Error, 7; Constitutional Law, 2, 3, 4.

CROSS-APPEAL. See Appeal and Error, 8.

CROSS-BILL.

Nature, must be germane to original bill. See Equity, 1, 2.

CROSS-COMPLAINT. See Mines and Mining, 1.

DAMAGES. See Condemnation Proceedings, 1.

DEATH BY WRONGFUL ACT.

1. DEATH BY WRONGFUL ACT—RIGHT OF ACTION—NON-RESIDENT ALIENS MAY MAINTAIN—REV. STATS. ARIZ. 1887, PARS. 2145, 2149, 2150, CONSTRUED.—Non-resident aliens may institute and maintain an action for injuries resulting in death caused by wrongful act, under paragraph 2145, *supra*, providing that "An action for actual damages on account of injuries causing the death of any person may be brought in the following cases . . .": paragraph 2149, *supra*, providing that "The action shall be for the sole and exclusive benefit of the surviving husband, wife, children and parents of the person whose death shall have been so caused"; and paragraph 2150, *supra*, providing that "The action may be brought by all parties entitled thereto, or by any one or more of them for the benefit of all." (*Bonthron v. Phoenix Light etc. Co.*, 129.)

DEED.

Tax, *prima facie* valid. See Tax-Title, 1.

Tax-collectors, must comply with requirements of statute. See Taxes and Taxation, 14, 15.

DEED (Continued).

Tax-Deed. See Tax-Title, 1, 2, 3.

Void tax-collector's, not basis for affirmative relief. See Taxes and Taxation, 15.

Void tax-collector's, not *prima facie* evidence of title. See Taxes and Taxation, 15.

See Conveyance, 2.

DEFAULT. See Appeal and Error, 20.

DEFENSE. See Limitations, 2; Mines and Mining, 2.

DEMURRER.

Contained in answer. See Limitations, 2.

See Eminent Domain, 3; Pleading and Practice, 1; Replevin, 1.

DEPARTMENT OF INTERIOR.

Rules and regulations, scope of. See Public Lands, 1.

DEPARTURE. See Limitations, 1.

DUE PROCESS OF LAW. See Constitutional Law, 14.

EJECTMENT.

1. EJECTMENT—DEFENSE—ADVERSE POSSESSION — STATEMENT OF LIMITATION—WHERE PLAINTIFF CLAIMS UNDER DEEDS FROM DEFENDANT —REV. STATS. ARIZ. 1887, PARS. 2297, 2299, CITED.—Under paragraph 2297, *supra*, providing that adverse possession must be either under title or color of title to set up the three-year bar, and paragraph 2299, *supra*, providing among other things that adverse possession must be under a deed duly registered to set up the five-year bar, a defendant in ejectment is precluded from setting up adverse possession for either period as against his own deed to plaintiff, upon which deed plaintiff declared solely. (Goldman v. Sotelo, 85.)
 2. SAME—SAME—SAME—SAME—FIVE-YEAR LIMITATION — PAYMENT OF TAXES—REV. STATS. ARIZ. 1887, PAR. 2299, CONSTRUED.—Under paragraph 2299, *supra*, providing that any one paying taxes on the property and doing certain other things may set up adverse possession for five years as a defense to an action to recover said property, evidence of payment of taxes prior to the particular years set up in the defense is irrelevant and immaterial. (Goldman v. Sotelo, 85.)
 3. SAME—ISSUES—INSTRUCTIONS TO JURY—MISLEADING.—Plaintiff in ejectment declared solely upon his conveyances from the defendant, which on their face vested in him title and right of possession. The defendant set up in his answer two defenses,—one that the deed relied on by plaintiff was a mortgage, the other that the action
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EJECTMENT (Continued).

of the plaintiff had been barred by the statute of limitations. The latter defense not being open under the pleadings and evidence, and the only issue being whether deed from defendant to plaintiff was intended as an absolute conveyance or as a mortgage, it was erroneous and misleading to instruct that the verdict must be for the defendant, even if plaintiff is shown to have the legal title, if defendant had the right to the possession of the property at the commencement of the action, as, under the issues, the defendant could not be found to have had the right to possession unless he had the legal title. (*Goldman v. Sotelo*, 85.)

4. EJECTMENT—FINDINGS—SUFFICIENCY—REV. STATS. ARIZ. 1887, PAR. 3139, CITED.—In an action of ejectment under the statute, *supra*, providing that "It shall be sufficient to entitle the plaintiff to recover to show, at the time the action was commenced, the defendant was in possession of the premises claimed, and that the plaintiff had a right to the possession thereof," no specific finding of an ouster is essential. Findings that plaintiffs are the owners and entitled to the possession and that defendants have withheld and continue to withhold the possession of the premises from the plaintiff satisfy the statute. (*Curtis v. Boquillas Land etc. Co.*, 258.)
5. EJECTMENT—UNOCCUPIED LAND—POSSESSORY RIGHT—REV. STATS. ARIZ. 1887, PAR. 2222 (AMENDED BY ACT NO. 79, p. 97, LAWS 1893, AND INCORPORATED IN REV. STATS. ARIZ. 1901 AS PAR. 3525), CONSTRUED AND HELD TO APPLY ONLY TO UNOCCUPIED GOVERNMENT LAND.—The statute, *supra*, providing that all persons settling upon public land with the view of acquiring title thereto shall be protected in the peaceable possession to the extent of one hundred and sixty acres, gives to settlers the right to hold solely by possession where the land is unoccupied government land, and has no application to unoccupied land in private ownership. (*Howard v. Perrin*, 347.)

ELECTION. See Pleading and Practice, 2.

ELECTIONS.

1. ELECTIONS—CHANGE OF POLLING-PLACE—REV. STATS. ARIZ. 1901, PARS. 2305, 2306, HELD MANDATORY.—Paragraph 2305, *supra*, provides that the board of supervisors must at least fifteen days prior to an election designate the place within each precinct where it shall be held. Paragraph 2306, *supra*, provides that if it cannot be held at the place designated, the justice of the peace or the election board must two days before the election designate the place by written notice. These provisions are mandatory. The action of an election board in holding an election at a ranch house instead of at the schoolhouse designated by the supervisors, with-

ELECTIONS (Continued).

out any attempt to comply with the requirements of the law relative to a change of the polling-place, and without any necessity or sufficient reason appearing to justify it, renders the election held there invalid, and the votes cast in that precinct cannot be counted. (*Johnstone v. Robertson*, 361.)

2. **ELECTIONS—CONTEST—EVIDENCE—BALLOTS—REGULARLY PRESERVED—ADMISSIBILITY.**—Where ballots are preserved in strict accordance with statutory requirements (*Rev. Stats. 1901, chap. 10*) they are admissible without further proof, and furnish the primary and controlling evidence of the number of votes cast for the respective candidates. (*Averyt v. Williams*, 355.)

3. **SAME—SAME—EVIDENCE—BALLOTS IRREGULARLY PRESERVED—ADMISSIBILITY—BURDEN OF PROOF AS TO IDENTITY—REV. STATS. ARIZ. 1901, PARS. 2389, 2395, DIRECTORY.**—The statute, *supra*, requiring that the ballots should be strung, placed in a sealed envelope, indorsed by each member of the election board writing his name across the seal, delivered by some member of the board to the clerk of the board of supervisors, and by him to the county treasurer, is not mandatory, but directory. Where ballots have been irregularly preserved, to render them admissible the burden is upon the party offering them to show that they are the identical ballots cast. The proof must be clear and satisfactory, but the mere fact that they might have been tampered with will not warrant rejection. (*Averyt v. Williams*, 355.)

4. **SAME—SAME—SAME—SAME—PRESERVATION—QUESTION OF FACT—APPEAL AND ERROR—REVIEW.**—The question of the preservation of ballots in their integrity is one of fact to be determined by the trial judge, and a finding thereon will not be disturbed unless not supported by the evidence. (*Averyt v. Williams*, 355.)

5. **SAME—APPEAL AND ERROR—BILL OF EXCEPTIONS—RECORD.**—An assignment of error that the trial court erred in refusing to strike out ballots as evidence on the ground that they did not purport to be official ballots cannot be considered where the ballots are expressly excluded from the bill of exceptions and the record does not disclose whether the ballots were or were not official. (*Averyt v. Williams*, 355.)

ELECTRICITY. See *Negligence*, 3.

EMBEZZLEMENT.

1. **EMBEZZLEMENT—INDICTMENT—SUFFICIENCY—AGENT OF CORPORATION—TRUST RELATION—REV. STATS. ARIZ. 1901, PEN. CODE, SEC. 458, CITED.**—Section 458, *supra*, provides that any officer, servant, or agent of a corporation who fraudulently appropriates to any use or purpose not in the execution of his trust any property in his

EMBEZZLEMENT (Continued).

possession or under his control by virtue of his trust shall be guilty of embezzlement. An indictment under said section, which charges that defendant, while acting as manager of the P. corporation, was intrusted by the S. corporation with a check, the proceeds of which he embezzled, but which, while averring the check was intrusted to him by virtue of his employment, does not allege what, if any, interest the P. corporation had in it, or that he received it for or on account of the P. corporation, but expressly avers that it was the property of the S. corporation, and that it was received by him in the name and on account of the S. corporation, is subject to demurrer, in not being direct and certain in setting out the trust relation under which the property was misappropriated. (*Hinds v. Territory*, 372.)

EMINENT DOMAIN.

1. EMINENT DOMAIN—POWER OF TERRITORY—REV. STATS. U. S., SEC. 1851, (ORGANIC ACT, REV. STATS. ARIZ. 1901, PAR. 15,) CITED—*OUERY v. GOODWIN*, 3 ARIZ. 255, 26 PAC. 376, FOLLOWED.—The territory of Arizona, though not possessing sovereignty, is clothed with authority to provide for the exercise of the power of eminent domain by section 1851, *supra*, providing that "The legislative power of this territory extends to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States." (*Sanford v. Tucson*, 247.)
2. SAME—LOCAL OR SPECIAL LAWS—CONSTITUTIONAL LAW—"HARRISON ACT"—1 SUPP. REV. STATS. U. S., P. 503, (ORGANIC ACT REV. STATS. ARIZ. 1901, PAR. 63) CITED—LAWS ARIZ. 1897, P. 97, NO. 57, CONSTRUED AND HELD CONSTITUTIONAL.—The "Harrison Act," *supra*, prohibits the territorial legislature from passing local or special laws incorporating cities, towns, or villages, or changing or amending the charter of any town or city. Act No. 57, *supra*, entitled "An act adding to the powers and privileges already vested by charter in incorporated cities," confers upon such cities the power "to lay out and establish, . . . pave or otherwise improve streets, alleys," and further authorizes such cities to proceed, wherever necessary, under the Eminent Domain Act of the territory to condemn private property for such purposes. *Held*, that said act No. 57 is neither local nor special, but confers equal powers and privileges upon all existing cities and such as might be incorporated in the future, and therefore is not in conflict with the provisions of the "Harrison Act," *supra*. (*Sanford v. Tucson*, 247.)
3. SAME—PLEADING—COMPLAINT—DEMURRER—ISSUES RAISED—LAWS ARIZ. 1897, ACT NO. 57, P. 97, CITED—"HARRISON ACT"—1 SUPP. REV. STATS. U. S., P. 503, (ORGANIC ACT, REV. STATS. ARIZ. 1901, PAR. 63,) CITED.—Where a complaint in an action by a city to condemn land to widen a street set forth that the cost, damages, and

EMINENT DOMAIN (Continued).

expenses to be incurred under the ordinance authorizing the improvement were to be defrayed by special assessment upon the property to be benefited by the improvement, and not to be paid by the city, a demurrer thereto does not raise the question whether in making such improvement the city is in a situation to avail itself of the power of eminent domain under act No. 57, *supra*, without violating the provision of the "Harrison Act," *supra*, which prohibits cities from becoming indebted to an amount exceeding four per centum on the value of their taxable property, nor does such inability militate against the validity of the act itself. (*Sanford v. Tucson*, 242.)

4. SAME—PUBLIC USE—QUESTION OF LAW.—What constitutes a public use is a question of law. (*Sanford v. Tucson*, 247.)
5. SAME—SAME—NECESSITY—QUESTION OF FACT—TO BE DECIDED BY THE COURT.—What constitutes a necessity to authorize the taking of private property for a public use, is a question of fact, but one nevertheless to be decided by the court, and not the jury. (*Sanford v. Tucson*, 247.)
6. SAME — PLEADING — COMPLAINT — MUST SHOW PLAINTIFF'S RIGHT—NECESSITY—REV. STATS. ARIZ. 1901, PARS. 2451, 2454, CONSTRUED.—Paragraph 2451, *supra*, provides that, before property can be taken in condemnation, it must appear that the use to which it is to be applied is a use authorized by law, and that the taking is necessary to such use. In paragraph 2454, *supra*, it is provided that the complaint in condemnation must contain certain averments; among others, "a statement of the right of the plaintiff." *Held*, that as the necessity for the taking is the basis for the exercise of the right, and as the statute requires the complaint to contain a statement of plaintiff's right, a complaint by a city seeking to condemn land to widen a street which does not aver nor show by the ordinance set forth therein that the taking is necessary is insufficient and subject to demurrer. (*Sanford v. Tucson*, 247.)

EQUITY.

1. EQUITY—PRACTICE—PLEADING—CROSS-BILL—NATURE—MUST BE GERMANE TO ORIGINAL BILL.—A cross-bill in equity must be germane to the original bill, and must not bring in new issues which would constitute the subject of an independent suit. (*Hoyois v. Salt River Valley etc. Co.*, 285.)
2. SAME—SAME—SAME—WATER AND WATER-RIGHTS—IRRIGATION—ACTION TO RESTRAIN INTERFERENCE IN OPERATION OF CANAL—CROSS-BILL TO DETERMINE PRIORITIES—DEMURRABLE.—In an action by an irrigation company brought for the purpose of restraining defendants from breaking the headgates and interfering with the management of plaintiff's canal, a cross-bill setting up that

EQUITY (Continued).

defendants were prior appropriators of water, and owners thereof, and praying that all parties claiming water should be made parties to the suit, with the view to the full adjudication of their respective rights to water, is demurrable as not germane to the original bill. (*Hayois v. Salt River Valley etc. Co.*, 285.)

3. **EQUITY—SPECIFIC PERFORMANCE—RIGHT TO—DEPENDENT UPON PERFORMANCE OF ALL CONDITIONS PRECEDENT.**—The right to specific performance is dependent upon full performance by a vendee, or any one in his right, of all conditions precedent required from him. (*Costello v. Friedman*, 215.)

See Action to Quiet Title, 1; Judgment, 2; Taxes and Taxation, 2, 3, 4, 12; Water and Water-Rights, 14, 15.

EVIDENCE.

Circumstantial, competency. See Criminal Law, 16.

Circumstantial, sufficiency of. See Criminal Law, 1, 16.

Right of jury to disregard testimony. See Criminal Law, 26.

See Action to Quiet Title, 2; Aliens, 4, 5; Appeal and Error, 7, 9, 10, 11, 12, 15, 16, 17, 22; Bonds, 1, 2; Condemnation Proceedings, 1, 2; Criminal Law, 5, 6, 22, 23, 24; Elections, 2, 3, 4; Homestead, 1; Judgment, 4, 5; Mechanics' Liens, 1, 3; Mines and Mining, 2, 3, 7; Railroads, 1; Tax-Title, 2, 3; Trover and Conversion, 1; Trusts, 1; Water and Water-Rights, 15, 17; Written Instrument, 1.

EXECUTION.

1. **EXECUTION—LEVY—SHERIFF'S SALE—SALE OF REALTY—VALIDITY—INNOCENT PURCHASER—LAWS OF ARIZ. 1889, ACT. NO. 20, CONSTRUED.**—Act No. 20, *supra*, provides that an execution "must require the officer serving the same, if the judgment be against the property of the judgment debtor, to satisfy the judgment . . . out of the personal property of such debtor, and if sufficient personal property cannot be found, then out of the debtor's real property." *Held*, that as against an innocent purchaser of realty claiming under an execution sale, a judgment debtor who failed to call the sheriff's attention to personalty, and to require him to satisfy the execution out of it, cannot question the validity of the sheriff's sale, because not complying with the act *supra*. (*Oliver v. Dougherty*, 65.)
2. **EXECUTION — SALE — PURCHASER — ACQUIRES DEBTOR'S TITLE—NO MORE.**—A purchaser under judicial sale acquires just such title as the execution debtor had at the time of such sale, and if the execution debtor was not the owner of the property at the time of the sale, the purchaser acquires no title thereto. (*Costello v. Friedman*, 215.)

EXECUTION (Continued).

3. **EXECUTION—SALE—SHERIFF'S DEED—STANDS ON SAME FOOTING AS WOULD DEBTOR'S.**—Where a judgment debtor could not have executed a deed conveying certain property which he had contracted to purchase, without full payment and full performance of the purchase agreement on his part, the sheriff's deed to said premises, based upon sale under execution against such debtor, could convey no title thereto. (*Costello v. Friedman*, 215.)

EXECUTORS AND ADMINISTRATORS.

1. **EXECUTORS AND ADMINISTRATORS—DUTIES—DISTRIBUTION OF ESTATE—PRESENTATION OF CLAIMS—ATTACHMENT—FORECLOSURE—PRIORITIES—REV. STATS. ARIZ. 1887, PARS. 1117, 1119, 1176, 1232, CITED AND CONSTRUED.**—Paragraph 1117, *supra*, prohibits the bringing of an action against an estate unless the claim is first presented to the executor or administrator, except that an action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint. Paragraph 1119, *supra*, provides that claims must be presented even though action be pending at the time of decedent's death, and that no recovery shall be had unless proof of such presentation be made. Paragraph 1176, *supra*, requires executors and administrators, where a sale is made of lands subject to mortgage or other lien, which is a valid claim against the estate, and has been presented and allowed, to apply the proceeds first to the payment and satisfaction of the mortgage or other lien. Plaintiff attached real estate prior to the death of the owner, and after the owner's death amended his complaint asking the foreclosure of his lien, but failed to waive all recourse against other property. *Held*, that the court had no authority to order a foreclosure of the lien by a sale of the property, but should require the payment and discharge of the judgment rendered in due course of administration, giving preference to the attachment lien in case a sale of the real estate is necessary to satisfy the judgment in the order of its priority over other valid liens. (*Wartman v. Pecka*, 8.)

FELLOW-SERVANT. See Railroads, 4, 5.

FINDINGS.

1. **FINDINGS—SUFFICIENCY—TO SUSTAIN JUDGMENT.**—The findings of the court must cover sufficient of the issues raised by the pleadings to sustain the judgment. (*County of Cochise v. Copper Queen etc. Co.*, 221.)

Sufficiency. See Ejectment, 4; Judgment, 5.

See Action to Quiet Title, 1; Appeal and Error, 9, 12, 13, 14, 22; Condemnation Proceedings, 3, 4; Mines and Mining, 1; Pleading and Practice, 3, 9.

FINDINGS OF FACT.

1. FINDINGS OF FACT—UPON GENERAL DENIAL—UPON CROSS-COMPLAINT—GENERAL FINDING IN FAVOR OF DEFENDANT INSUFFICIENT.—Where a defendant merely denies the allegations of plaintiff's complaint a general finding for the defendant will be sufficient; but where the defendant sets up a cross-complaint, and asks for affirmative relief based upon the facts set up in the cross-complaint, a general finding for the defendant is not sufficient, but there should be a special finding of fact upon the cross-complaint upon which a judgment can be founded. (*Shattuck v. Costello*, 22.)
2. SAME—SUFFICIENCY—UPON CROSS-COMPLAINT—ACTION TO QUIET TITLE—REV. STATS. ARIZ. 1901, PAR. 1406, CONSTRUED.—The statute, *supra*, requires that "In all cases where a trial of an issue of fact is held by the courts of record . . . the decision of the court shall be in writing . . . and the facts found and the conclusions of law shall be separately stated . . . and judgment . . . entered accordingly." In an action to quiet title to a mining claim, defendant alleging a conflicting location and asking that title be quieted, a finding upon the issues of fact that "the court finds in favor of defendant and against plaintiff, and that the allegations of defendant's cross-complaint are true," is insufficient to support a judgment quieting defendant's title to the premises, but full findings of fact should be made. (*Shattuck v. Costello*, 22.)

See Appeal and Error, 4.

FIXTURES.

1. FIXTURES—TROVER AND CONVERSION—PUBLIC LANDS—FENCE ON.—A fence placed on government land by mistake passes with the land to a subsequent purchaser from the government, and the original owner thereof cannot maintain an action against the purchaser for conversion in removing and selling the fence, as the doctrine of trade fixtures and right of removal thereof does not apply. (*Hereford v. Pusch*, 76.)

See Trover and Conversion, 1.

FORECLOSURE. See Action to Quiet Title, 2; Attachment, 1; Executors and Administrators, 1.

FOREST RESERVES. See Constitutional Law, 2, 3, 4.

FRAUD.

Sufficiency of allegations of. See Conveyance, 1; Pleading, 1; Taxes and Taxation, 5.

See Partnership, 1, 2.

GENERAL DENIAL. See Mines and Mining, 1; Replevin, 1.

HARMLESS ERROR.

Improper remarks of counsel. See Criminal Law, 19.

See Appeal and Error, 15; Condemnation Proceedings, 1, 2;
Criminal Law, 6; Pleading, 2.

HOMESTEAD.

1. **HOMESTEAD—MORTGAGE—VALIDITY—CONVEYANCE BY ONE SPOUSE—EVIDENCE—VALUE IMMATERIAL—NO LIEN AS TO EXCESS.**—It is not error for the trial court to reject evidence offered by plaintiff tending to show the value of the homestead was in excess of four thousand dollars, for the purpose of showing that a mortgage, invalid as against the homestead, attached to the excess, as every attempt by either spouse to convey or mortgage the homestead, without the other joining in such conveyance or mortgage, is unavailing to create any lien thereon, irrespective of the value thereof. (Edwards v. Simms, 261.)

2. **SAME—SAME—CONVEYANCE—AGREEMENT TO ASSUME MORTGAGE—NOT BINDING—CONSIDERATION.**—An agreement by the grantees of a homestead to assume the payment of a mortgage thereon, as part payment of the purchase price, is without consideration, where the court found the mortgage to be null and void; the conveyance also being presumptively inefficient to convey any interest to the purchaser. (Edwards v. Simms, 261.)

IMPEACHMENT. See Appeal and Error, 17; Criminal Law, 6.

INDIANS. See Criminal Law, 10.

INDICTMENT.

Defective allegation of intent cured by verdict. See Criminal Law, 2.
Duplicity in. See Criminal Law, 3, 7.

Sufficiency of. See Criminal Law, 3, 13, 28; Embezzlement, 1.

See Criminal Law, 8, 9.

INJUNCTION.

1. **INJUNCTION—CORPORATIONS—STOCKHOLDERS.**—An injunction is properly refused where the suits which minority stockholders of a corporation seek to enjoin the corporation from dismissing are at the time dismissed or are enjoined from being dismissed by the court in which they are pending, or have been decided favorably to plaintiffs' prayer for relief, and officers of such corporation sought in the action to be removed have already resigned, since no case is presented where an injunction could afford plaintiffs any relief. (Hallenborg v. Cobre Grande etc. Co., 329.)

See Taxes and Taxation, 12, 13; Water and Water-Rights, 14.

INJURIES TO THE PERSON. See Limitations, 1.

INNOCENT PURCHASER. See Execution, 1.

INSTRUCTIONS TO JURY.

Misleading. See Ejectment, 3.

See Railroads, 3, 4, 6.

INSULATION. See Negligence, 3.

INTENT. See Criminal Law, 2, 10.

INTEREST.

1. INTEREST—RATE ON JUDGMENT—REV. STATS. 1901, PAR. 2774, CITED.—The legal rate of interest upon judgments under the statute, *supra*, is six per cent per annum. (Howard v. Perrin, 347.)

Rate on judgment, bears rate provided in agreement. See Negotiable Instruments, 1.

INTERNAL REVENUE.

1. INTERNAL REVENUE—STAMP-TAX—SHERIFF'S CERTIFICATE—ASSIGNMENT—STAMP NOT REQUIRED—ACT CONGRESS, JUNE 13, 1898, CONSTRUED.—As the act of Congress, *supra*, does not require a sheriff's certificate of sale to be stamped, the assignment of such instrument is also free from the duty, as it is only where the original instrument is subject to the duty that assignments are required to be stamped. (Oliver v. Dougherty, 65.)

INTERROGATORIES. See Action to Quiet Title, 1.

INTERVENTION. See Appeal and Error, 18, 19.

INTOXICATING LIQUORS. See Criminal Law, 10.

IRRIGATION. See Equity, 2; Water and Water-Rights, 14, 15.

ISSUES. See Ejectment, 3; Eminent Domain, 3.

JUDGMENT.

1. JUDGMENT—ACTION TO SET ASIDE—SICKNESS OF ATTORNEY—SHOWING—SUFFICIENCY.—In an action to set aside a judgment of foreclosure complainants alleged that they were non-residents of Arizona, that they relied exclusively upon their attorney for information as to what occurred in the local courts, and that they were ignorant of the entry of the said judgment until two years thereafter; that their attorney at the date of the entry of judgment

JUDGMENT (Continued).

was sick and not in a condition of mind and body to properly attend to their business, and did not know of the entry of judgment; that shortly after the entry thereof he died. The name of the attorney appeared both in the answer and the agreed statement of facts, and the transcript of the minute entries shows his presence in court in their behalf on the day when the case was submitted, and also on the day when the judgment was rendered. There was no evidence to sustain the allegations respecting the attorney's incapacity, his ignorance of the fact of judgment, or concerning the time of his death. *Held*, that no sufficient showing was made to entitle complainants to have the judgment set aside. (*MacRitchie v. Stevens*, 410.)

2. **SAME—SAME—EQUITY—WHEN WILL INTERFERE.**—Courts of equity will not interfere to grant relief against a judgment unless it appears that the party complaining could not avail himself of his defense in the action, or that he was prevented from doing so by fraud, accident, or mistake, without fault or negligence on his part. (*MacRitchie v. Stevens*, 410.)
3. **JUDGMENT—BAR—DIFFERENT PARTIES—ANOTHER CAUSE OF ACTION.**—A judgment in an action based upon a bond given to secure the county for another and distinct term of office of the defendant as treasurer, though for the same office, would not be a bar to a subsequent action on a different bond given by the same official for a separate and distinct term, the parties in the latter action and the cause of action being different. (*Brady v. County of Pinal*, 114.)
4. **JUDGMENT—RECORD—EVIDENCE—SUFFICIENCY—WILLARD v. CARRIGAN**, 8 ARIZ. 70, 68 PAC. 538 CITED.—To enable the appellate court to affirm a judgment of the lower court in favor of a plaintiff therein, the record must disclose some positive, affirmative evidence in support thereof. (*Stoffelo v. Molina*, 211.)
5. **SAME—SAME—SAME—SAME—DESCRIPTIONS—FINDING.**—In an action in ejectment, where the only affirmative evidence in support of plaintiff's allegation of title was documentary, showing that plaintiff was the owner of a certain strip of land, it is insufficient to support a judgment in his favor, the description of the land in controversy being given in the complaint from local objects, and no evidence being introduced showing that the land described in the complaint was the same as that described in the documentary evidence. (*Stoffelo v. Molina*, 211.)

Default. See Appeal and Error, 20, 21, 22.

Rate of interest on. See Interest, 1.

See Water and Water-Rights, 15.

JUDICIAL NOTICE. See Courts, 1.

JURISDICTION. See Appeal and Error, 3, 6; Courts, 2; Probate Court, 1.

JUROR.

Prejudice.- See Criminal Law, 27.

JURY. See Action to Quiet Title, 1; Criminal Law, 11; Trial, 1.

JUSTICE OF THE PEACE.

1. JUSTICE OF THE PEACE—FEES—CRIMINAL CASES—LOCAL AND SPECIAL LEGISLATION—CONSTITUTIONAL LAW—HARRISON ACT (24 STATS. 170,—ORGANIC ACT, REV. STATS. 1901, PAR. 63) CITED—REV. STATS. 1901, PEN. CODE, SEC. 1183, HELD VOID.—The “Harrison Act,” *supra*, provides that “The legislatures of the territories of the United States . . . shall not pass local or special laws . . . regulating the jurisdiction and duties of justices of the peace.” Section 1183, *supra*, reads: “No justice of the peace . . . residing and holding his court at the county seat . . . shall receive or collect from the county any fees or compensation in any criminal case unless the warrant of arrest was issued in such case by and with the advice of the district attorney.” *Held*, that when, as in this instance, the object aimed at by the statute is broad enough to cover the class excluded as well as the class included within its operation, mere convenience or expediency is not sufficient to form the basis of classification, and therefore the latter act, *supra*, is special and local legislation, and void, because in conflict with the provisions of the “Harrison Act,” *supra*. (*Maricopa County v. Burnett*, 242.)

LARCENY. See Criminal Law, 11.

LEVY. See Execution, 1.

LIEN. See Attachment, 1; Statutory Construction, 1; Tax-Title, 1.

LIMITATIONS.

1. LIMITATIONS — INJURIES TO PERSON—PLEADING—AMENDMENT—NEW CAUSE OF ACTION—DEPARTURE—REV. STATS. ARIZ. 1887, PAR. 2309, CITED.—The Revised Statutes of Arizona of 1887 (par. 2309) provide that actions for injuries done to the person of another shall be commenced and prosecuted within one year after the cause of action shall have accrued. Plaintiff, on behalf of his minor son, brought an action against defendant to recover damages for personal injury. More than a year after the injury, plaintiff amended his complaint, making the action one for his own benefit. *Held*, that

LIMITATIONS (Continued).

the amended complaint was such a departure from the original complaint as to state a new and different cause of action, and, being filed more than one year after the injury was received, from which it was alleged the damages arose, was barred by the statute, *supra*. (Motes v. Gila Valley etc. Ry. Co., 50.)

2. **SAME—DEFENSE—HOW RAISED—DEMURRER—CONTAINED IN ANSWER—**REV. STATS. ARIZ. 1887, PARS. 734, 2328, CONSTRUED.—The Revised Statutes of Arizona of 1887 (par. 2328) provide that "the laws of limitation of this territory shall not be made available to any person in any suit in any of the courts of this territory, unless such be specially set forth as a defense in his answer." Paragraph 734, *supra*, provides that "the defendant in his answer may plead as many several matters, whether of law or fact, as may be necessary for his defense." *Held*, that the only purpose of the former statute is to compel defendant to specially plead the statute of limitations; that it does not prohibit the pleading of the statute by demurrer under the authority of the latter statute. (Motes v. Gila Valley etc. Ry. Co., 50.)
3. **LIMITATIONS—PLEADING.**—The pleading of the statute of limitations does not dispense with the necessity of also pleading all facts essential to bring the party within the provisions of the statute, when the existence of those facts is not shown by the pleading of the opposite party. (Seaverns v. Costello, 308.)

LOCAL OR SPECIAL LAWS. See Eminent Domain, 2; Justice of the Peace, 1.

MALICIOUS INJURY TO PRIVATE ROAD. See Criminal Law, 12, 13.

LOCATION.

Valid; prior; relocation; premature. See Mines and Mining, 3, 4, 5, 6, 7.

MANDAMUS.

1. **MANDAMUS—WHEN ISSUED.**—*Mandamus* will only issue to compel the performance of an act which the law has specifically enjoined as a duty and which is not in its nature discretionary or judicial; and it may only issue when there is not a plain, speedy, and adequate remedy in the ordinary course of the law. (Dorrington v. Board of Supervisors, 4.)
2. **SAME—COUNTIES—DEMANDS—BOARD OF SUPERVISORS—DISCRETIONARY POWER—OFFICERS—SALARY—**REV. STATS. ARIZ. 1887, PARS. 409, 415, CONSTRUED.—Under paragraph 409, *supra*, forbidding the board of supervisors to allow any demand in favor of any officer

MANDAMUS (Continued).

who willfully neglects or refuses to perform any of the duties of his office, and empowering it to determine whether the officer presenting a demand is entitled to have the same allowed, and paragraph 415, *supra*, giving a dissatisfied claimant the right to sue the county at any time within six months after the final action of the board, but not afterward, *mandamus* will not lie to compel the board of supervisors to allow the claim of a county officer for salary and expenses, the former statute vesting discretionary powers in the board and the latter providing a plain, adequate, speedy, and exclusive remedy at law. (*Dorrington v. Board of Supervisors*, 4.)

3. **MANDAMUS TO DISTRICT ATTORNEY—QUO WARRANTO—REV. STATS. 1901, PAR. 3794, CONSTRUED.**—While the statute, *supra*, authorizing *quo warranto* does not make it mandatory upon a district attorney to institute such action unless he has reason to believe a franchise is being usurped, nevertheless it is his duty, whenever facts are laid before him from which he can reasonably conclude that a franchise is being usurped, to institute such proceedings, and if he fails his action can be reviewed upon an application for *mandamus*. (*Buggeln v. Doe*, 341.)
4. **SAME—SAME—SAME—PLEADING—SUFFICIENCY OF PETITION.**—A petition for writ of *mandamus* to compel a district attorney to institute *quo warranto* proceedings is insufficient where it appears that all that was presented to him was a verified complaint, possibly sufficient as a pleading in *quo warranto*, which did not contain allegations sufficient to show that the franchise was being usurped. The application for writ of *mandamus* must show that facts were laid before him from which he could have had reason to believe that such franchise was being usurped. (*Buggeln v. Doe*, 341.)

MERCHANDISE.

What is, within purview of United States Revenue Law. See Revenue Law, 1.

MECHANICS' LIENS.

1. **MECHANICS' LIENS—PLEADING—COMPLAINT—EVIDENCE—VARIANCE.**—In an action to enforce a mechanic's lien for castings made and furnished, the complaint stated that they were furnished upon the verbal request of defendant, who verbally agreed to pay a certain sum therefor. The notice stated that the materials were furnished at the "specified price of \$125.22, at the special instance and request of L. and P. and the said materials were worth the" said sum. The evidence established that the materials were furnished at a certain price upon the request of defendant; that a bill was presented therefor, the items of which were taken from

MECHANICS' LIENS (Continued).

plaintiff's order book. *Held*, that there was no variance between the complaint and notice and the evidence adduced in support thereof, on the theory that the complaint and notice of lien alleged a verbal contract, whereas the testimony showed that the defendants had simply ordered the material without agreeing upon any specified price, and the plaintiff had charged the reasonable value thereof after completion. (*Wolfley v. Hughes*, 203.)

2. **SAME—LIENABLE AND NON-LIENABLE ITEMS—ENFORCEMENT.**—Where, in an action to enforce a mechanic's lien, it appears that some of the articles were furnished more than ninety days before the filing of the lien, the lien will nevertheless be enforced as to articles furnished within the statutory period, where no fraud or bad faith is shown on the part of the plaintiff and he was justified in believing himself entitled to a lien for the item excluded by the court. (*Wolfley v. Hughes*, 203.)
3. **SAME—SAME—EVIDENCE—SEGREGATION.**—In an action to enforce a mechanic's lien for materials furnished, all the items of which were of such a character that the property would be liable therefor if the lien on behalf thereof had been filed within the proper time, evidence is properly received to segregate the lienable from the non-lienable items, some of the articles having been furnished more than ninety days prior to the filing of the notice. (*Wolfley v. Hughes*, 203.)

MERCHANT.

Salesman is not. See Aliens, 1.

See Aliens, 3.

MINES AND MINING.

1. **MINES AND MINING—ACTION TO QUIET TITLE—PLEADING—GENERAL DENIAL—CROSS-COMPLAINT—FINDINGS.**—In a suit to quiet title to a mining claim, the defendant having answered denying the validity of the plaintiff's location, and by way of cross-complaint having asked that his title to a conflicting location be quieted as against plaintiff, it is the duty of the court to determine the validity of defendant's claim as well as the plaintiff's although the latter only would need to be determined under a general denial. (*Shattuck v. Costello*, 22.)
2. **MINES AND MINING—ACTION TO RECOVER CLAIM—DEFENSE—STATUTE OF LIMITATIONS—ADVERSE POSSESSION—EVIDENCE—SUFFICIENCY—REV. STATS. ARIZ. 1887, PARS. 2229, 2328, CITED.**—In an action to recover a mining claim, where defendant pleaded the statute of limitations, in compliance with paragraphs 2299 and 2328, *supra*, setting up adverse possession for ten years, and offered evidence to support the claim of adverse possession, that he had been upon the prem-

MINES AND MINING (Continued).

ises, supposed that he owned it, having the tax-title deed from the county, but that he had done nothing thereon, except pay the taxes for ten years, such evidence is too meager and indefinite to establish the "peaceable and adverse possession" without which the plea of limitations is unavailing. (*Seaverns v. Costello*, 308.)

3. ~~MINES AND MINING—LOCATION—VALIDITY—ACTION TO QUIET TITLE—EVIDENCE—BURDEN OF PROOF.~~—Where both parties claim certain property as a mining claim, and both seek to have their title quieted, each claiming under a relocation, the burden is on each party to prove the validity of his location, the duty of taking the initiative in such proof resting upon the plaintiff. (*Shattuck v. Costello*, 22.)
4. ~~SAME—SAME—SAME—DESCRIPTION—BOUNDARIES OF ANOTHER CLAIM—MONUMENTS.~~—To name mining claims as the boundaries of a location is such a reference to natural objects and permanent monuments as to comply with the statute. (*Shattuck v. Costello*, 22.)
5. ~~SAME—SAME—SAME—SAME—PRESUMPTIONS—EVIDENCE—BURDEN OF PROOF.~~—Where mining claims are used in a location notice to designate the boundaries of a claim, the presumption is that such objects exist, and the duty to show that they do not exist is cast upon the disputing party. (*Shattuck v. Costello*, 22.)
6. ~~SAME—ACTION TO QUIET TITLE—RELOCATION—VALIDITY—PRIOR LOCATION.~~—The evidence in an action to quiet title to a mining claim reviewed and held to show that at the time of defendant's location the ground was covered by an existing valid location, and therefore not open to relocation. (*Shattuck v. Costello*, 22.)
7. ~~SAME—SAME—SAME—SAME—SAME—EVIDENCE—ADMISSIONS—PREMATURE LOCATION.~~—Defendant located a mining claim on December 12, 1895. On January 1, 1896, plaintiff located the same claim. Suit having been brought to quiet title, and the issue being whether a prior location was existing at the time of defendant's location, thereby rendering said location invalid, evidence was introduced showing that on January 27, 1900, defendant filed location notices upon the ground in dispute, declaring that they constitute a "relocation of the ground formerly located by unknown parties and abandoned in 1895 or 1896." *Held*, that such filing stands in the nature of an admission by defendant that his location of December 12, 1895, was premature. (*Shattuck v. Costello*, 22.)

See Conveyance, 1; Partnership, 1, 2.

MONUMENTS. See Mines and Mining, 4.

MORTGAGE. See Action to Quiet Title, 2; Homestead, 1, 2.

MOTION.

For new trial. See Appeal and Error, 21.

To set aside service by publication. See Appeal and Error, 21.

MOTIVE. See Criminal Law, 5.

MURDER. See Criminal Law, 14, 15, 16, 17, 18.

NECESSITY.

For taking property for public use, question of fact, to be decided by the court. See Eminent Domain, 5.

NEGLIGENCE.

1. **NEGLIGENCE—WHAT CONSTITUTES—ESSENTIAL INGREDIENT.**—An essential ingredient to any conception of negligence is that it involves the violation of some legal duty—a duty to take care of the person or property of another. (*Phoenix Light etc. v. Bennett*, 314.)
2. **SAME—REASONABLE CARE.**—Where a person, proceeding in a lawful business, exercises reasonable care, the law does not make him an insurer against the consequences of his actions which reasonable care and foresight could not have prevented. (*Phoenix Light etc. v. Bennett*, 314.)
3. **SAME—ELECTRICITY—WIRING—INSULATION—MUST BE SUFFICIENT TO PROTECT FROM CURRENT CARRIED FROM DEFENDANT'S PLANT—BUT NOT TO PROTECT FROM ELECTRICITY HAVING ITS ORIGIN IN THE CLOUDS OR ATMOSPHERE.**—Where plaintiff's house was destroyed by fire during a violent electrical storm, and plaintiff brought suit against defendant and electric light company, making the gravamen of his action the negligence of defendant in failing to properly insulate the wire which "it placed through the window casement of plaintiff's house" for the purpose of conveying to lights in said house the current generated by said defendant, the court erred in submitting to the jury any question as to the defendant's liability for a failure to insulate these wires against electricity having its origin in the clouds or atmosphere. (*Phoenix Light Co. v. Bennett*, 314.)

See Railroads, 1, 2, 3, 4, 5, 6.

NEGOTIABLE INSTRUMENTS.

1. **NEGOTIABLE INSTRUMENTS — NOTES — INTEREST—RATE—WHERE NOT PROVIDED—WHERE PROVIDED—JUDGMENT—BEARS RATE PROVIDED—REV. STATS. ARIZ. 1887, PARS. 2161, 2162, CONSTRUED.**—Under paragraph 2161, *supra*, providing that when there is no express agreement fixing a different rate of interest, interest at the rate of seven per cent per annum shall be allowed on notes after maturity, and paragraph 2162, *supra*, providing that parties may agree in writing to any rate of interest on notes, and any judgment rendered on such contract shall bear the rate of interest agreed upon by the parties, a note calling for interest at the rate of one per cent per month, and containing no provision as to the rate after maturity, bears interest after maturity at the stipulated rate, and not at seven per cent per annum. (*Greenhaw v. Holmes*, 94.)

NEW TRIAL.

Neglect of defendant's counsel, not ground for. See Criminal Law, 17.

When granted. See Taxes and Taxation, 13.

NOTES. See Negotiable Instruments.

OBTAINING MONEY BY FALSE PRETENSES. See Criminal Law, 20.

OCCUPANTS. See Public Lands, 3.

OFFICE AND OFFICERS.

1. **OFFICE AND OFFICERS—BOND—TO TERRITORY—JOINT AND SEVERAL—PROPER FORM.**—A county treasurer's bond running not to the county, but to the territory of Arizona, and being joint and several, is proper in form. (*Brady v. County of Pinal*, 114.)

Salary. See Mandamus, 2.

ORDER.

1. **ORDER—FOR PAYMENT OF MONEY—CONSTRUCTION.**—An employee of defendant gave an order on it as follows: "Please pay to B. Co. the amount due them for my monthly purchases from money due from" defendant, and said order was accepted by defendant. *Held*, that the meaning of said order is not so clear that it referred only to the amount of money due at the time as to justify the court in striking out allegations in the complaint tending to show that the order was understood by the parties as a continuing order. (*Burmister v. The Empire Gold etc. Co.*, 158.)

ORES.

Roasting. See Public Lands, 2.

PARTIES.

Persons denied permission to intervene are not, and have no right of appeal from such denial. See Appeal and Error, 18.

See Action to Quiet Title, 2; Bonds, 4.

PARTITION.

1. **PARTITION—COTENANT—IMPROVEMENTS—COMPENSATION—DISTRIBUTION—GENERAL RULE—IMPROVEMENTS MADE BY THIRD PERSON.**—Where, in an action for partition, the evidence discloses that the stepfather of defendants, minors, made valuable improvements on the property, but it was not shown that defendants made any improvements thereon, or that they paid for or were obligated to

PARTITION (Continued).

pay for the same, the rule that, on partition, improvements made in good faith by one cotenant, unless such improvements were essential to the preservation of the property, should be taken into account by the court, and either a suitable compensation be made therefor to such cotenant, or, if it can be done without prejudice to the interest of the other parties, such improvements should be assigned to the cotenant making them, does not apply. (*Pesqueira v. Kellogg*, 266.)

PARTNERSHIP.

1. PARTNERSHIP—JOINT VENTURES—SALE OF PROPERTY—FRAUD—SECRET PROFITS—LIABILITY OF PARTNERS—MINES AND MINING.—

Defendants, co-owners of a mining claim, with plaintiff, represented that defendant L. was to purchase the claims in controversy for eight thousand dollars, and, relying upon representations, plaintiff conveyed his interest to defendant L. for \$2,666. As a matter of fact, L. had transferred to defendants, plaintiff's co-owners, in addition to their proportionate share of the eight thousand dollars, twenty thousand dollars of the capital stock of a corporation organized to operate the mine. *Held*, that the relations of plaintiff and his co-owners were of such mutual and confidential nature as required of them full disclosure of all the facts pertaining to the consideration for the sale, and that equity requires that plaintiff should receive his proportionate share of the capital stock issued to his co-owners. (*Upton v. Weisling*, 298.)

2. SAME—SAME—SAME—SAME—SAME—LIABILITY OF PURCHASER—MINES AND MINING.—

Plaintiff was induced by his co-owners to convey his one-third interest in certain mining property, they representing to him that the entire property was to be sold for eight thousand dollars, whereas in fact, by a secret agreement with the purchaser, they were to receive, in addition to their share of the purchase price, twenty thousand dollars in capital stock of a corporation to be organized to work said property. While defendant purchaser had knowledge of the fraud practiced upon plaintiff by his co-owners in misrepresenting the purchase price, he did not participate in the deception, nor did their concealment enable him to get the property at any better price, or benefit him in any wise. *Held*, that the relation of defendant purchaser to plaintiff was different from that of the co-owners, and a judgment against him for a proportionate share of the stock issued was unwarranted. (*Upton v. Weisling*, 298.)

PERCOLATING WATERS. See Water and Water-Rights, 16.

PETITION.

For writ of *mandamus*, sufficiency of. See *Mandamus*, 4.

Revenue Laws, 2.

PLACER GOLD.

Is merchandise within purview of United States Revenue Law. See Revenue Laws, 1.

PLEA IN BAR. See Pleading and Practice, 1.

PLEADINGS.

1. **PLEADING—FRAUD—ALLEGATION—SUFFICIENCY.**—To characterize an act as "fraudulent" does not, in legal effect, charge it as fraudulent, unless some circumstance or fact be charged which shows in what the fraud consists and how it has been effected. (*County of Cochise v. Copper Queen etc. Co.*, 221.)
2. **PLEADING—HARMLESS ERROR—LEVY v. LEATHERWOOD, 5 ARIZ. 244, 52 PAC. 359, CITED.**—No prejudicial error was committed by the court in overruling a demurrer to defendant's plea in abatement and a motion to strike, where it subsequently overruled the plea and denied the motion. (*Wulff v. Lindsay*, 168.)

Amendment upon trial, discretionary. See Appeal and Error, 30.

See Action to Quiet Title, 3; Bonds, 2, 4; Conveyance, 1; Eminent Domain, 3, 6; Equity, 1, 2; Limitations, 1, 3; Mandamus, 4; Mechanics' Liens, 1; Mines and Mining, 1; Replevin, 1; Taxes and Taxation, 5, 6, 7, 8; Trover and Conversion, 5, 6, 7, 8; Water and Water-Rights, 14.

PLEADING AND PRACTICE.

1. **PLEADING AND PRACTICE—ANSWER—DEMURRER—PLEA IN BAR—AMENDMENT—REV. STATS. ARIZ. 1901, PARS. 1288, 1293, 1350, CONSTRUED.**—Under paragraph 1350, *supra*, providing that the defendant in his answer may plead as many defenses as he may have, but such pleas must be separately stated in one answer, filed at the same time, and in the following order: "(5) Demurrer. (6) In bar of the right to sue," paragraph 1288, *supra*, providing that all pleadings or proceedings may, upon leave of court, be amended at any stage of the action, or they may be amended before trial, without leave, upon serving the adverse party with a copy, and paragraph 1293, *supra*, providing that the court shall disregard any error or defect in the pleadings which shall not affect the substantial rights of the parties, and no judgment shall be reversed or affected on account thereof,—a general demurrer is an answer which before trial may be amended, as a matter of right, by alleging matters in bar of an action. (*Perrin v. Mallory Commission Co.*, 404.)
2. **PLEADING AND PRACTICE—COMPLAINT—CAUSE OF ACTION—CONTRACT—QUANTUM MERUIT—COUNTS—ELECTION—COMMISSIONS—BROKER—REV. STATS. ARIZ. 1901, PARS. 1280, 1289, 1291, CONSTRUED.**—Para-

PLEADING AND PRACTICE (Continued).

graph 1280, *supra*, provides that "The complaint may contain several different causes of action." Paragraph 1289, *supra*, provides that "The complaint shall set forth . . . a concise statement of the causes of action . . . and shall also state the nature of the relief he demands." Paragraph 1291, *supra*, provides that "Only such causes of action may be joined as are capable of the same character of relief." While in a general way, under the statutes, *supra*, a plaintiff who has but one cause of action will not be permitted to plead it as though he possessed two or more distinct demands, yet in a suit to recover broker's commission it is proper to deny a motion to compel plaintiff to elect between his counts before going to trial, the first being on an express contract, the second on a *quantum meruit*, this being a case in which the plaintiff is entitled to frame his pleading to meet the possible proofs which will for the first time fully appear on the trial. (*Willard v. Carrigan*, 70.)

3. SAME—TWO COUNTS ON SAME CAUSE OF ACTION—FINDING—EFFECT.—Where plaintiff brought suit to recover a broker's commission, and his complaint contained two counts,—one on an express contract, and the other on a *quantum meruit*,—a finding of the court in favor of the plaintiff on the first count was tantamount to a finding against him on the second. (*Willard v. Carrigan*, 70.)

POSSESSORY RIGHT. See Ejectment, 5.

POSTMASTER.

1. POSTMASTER—BOND—ACTION ON—PARTY PLAINTIFF.—Suit cannot be brought by the owner of a registered package in his own name on a postmaster's bond to recover for negligent loss of the package. (*United States v. Griswold*, 453.)
2. SAME—SAME—LOSS OF REGISTERED PACKAGE—EXTENT OF LIABILITY—REV. STATS. U. S., SEC. 3834 (U. S. COMP. STATS. 1901, P. 2610), AND SEC. 3926 (U. S. COMP. STATS. 1901, P. 2685), CONSTRUED.—Under section 3834, *supra*, requiring a postmaster to give bond conditioned for the faithful discharge of all duties, and section 3926, *supra*, in regard to registration of mail matter, providing that the sender shall be entitled to be indemnified to the extent of ten dollars, the United States may recover on a postmaster's bond the full value of a registered package, though exceeding ten dollars, the recovery being for the benefit of the sender. (*United States v. Griswold*, 453.)
3. POSTMASTERS—BOND—LIABILITY—LOSS OF REGISTERED PACKAGE—REV. STATS. U. S., SEC. 3834 (U. S. COMP. STATS. 1901, P. 2610), AND SEC. 3926 (U. S. COMP. STATS. 1901, P. 2685), CONSTRUED.—Under section 3834, *supra*, providing that a postmaster shall give bond for the faithful discharge of all duties imposed either by

POSTMASTER (Continued).

law or the rules of the department, and section 3926, *supra*, authorizing the postmaster-general to establish a uniform system of registration, conditioned that the post-office department, or its revenue, shall not be liable for the loss of any mail matter on account of its having been registered, the sureties on a postmaster's bond, conditioned as required by section 3834, *supra*, are liable for the loss of a registered letter occasioned by the negligence of the postmaster. (United States v. Griswold, 453.)

POWERS.

1. **POWERS—WHEN IRREVOCABLE—TRICKEY v. CROWE**, *ante*, p. 176, 71 PAC. 965, FOLLOWED.—The interest which will render a power of attorney irrevocable must be in the subject of the power, and not pertain to the power itself. (Taylor v. Burns, 463.)

See Sale, 1.

PRACTICE.

1. **PRACTICE—PRAYER FOR JOINT AND SEVERAL JUDGMENT—ENTERING SEPARATE JUDGMENTS FOR PROPORTIONATE AMOUNT—NOT ERROR PREJUDICIAL TO DEFENDANT.**—Where plaintiff brought suit to recover broker's commission against five defendants jointly, and prayed for a joint and several judgment for ten thousand dollars, the court committed no error prejudicial to defendants in entering a separate judgment against each defendant for two thousand dollars. (Willard v. Carrigan, 70.)

Appeal. See Criminal Law, 21.

See Equity, 1, 2.

PREJUDICE.

Juror. See Criminal Law, 27.

PRESUMPTION.

That incompetent evidence was disregarded, where competent evidence supports judgment. See Appeal and Error, 10.

See Mines and Mining, 5.

PRINCIPAL. See Criminal Law, 28.

PRIORITIES. See Executors and Administrators, 1.

PRIVATE ROAD.

What constitutes. See Public Highways, 1.

PRIVILEGED PERSONS. See Aliens, 1.

PROBATE COURT.

1. PROBATE COURT—WILL CONTEST—ABSENT HEIRS—APPOINTMENT OF COUNSEL—ALLOWANCE—JURISDICTION—REV. STATS. ARIZ. 1887, PAR. 1290, CONSTRUED.—Under the statute, *supra*, providing that at or before the hearing of petitions and contests for the probate of wills, the court may appoint an attorney for unrepresented heirs, and that such attorney may receive a fee to be fixed by the court for his services, which must be paid out of the funds of the estate as necessary expenses of administration, and upon distribution may be charged to the party represented, the probate court, or the district court on appeal, has authority to fix the attorney's fee and order its payment at any time after the completion of the services for which he was appointed. (Estate of Roarke, 16.)
2. SAME—SAME—SAME—SAME—SAME—SAME—EX PARTE ORDER—NOTICE UNNECESSARY.—Where an attorney had been appointed under the statute, *supra*, for unrepresented heirs in the contest of probate of a will, an order directing the payment of said attorney's fee may be made *ex parte*, and no notice of entry is required. (Estate of Roarke, 16.)
3. SAME—SAME—SAME—SAME—VALIDITY—NOT AFFECTED WHERE ONE OF HEIRS IS ALREADY REPRESENTED—REV. STATS. ARIZ. 1887, PAR. 1290, CONSTRUED.—Where an attorney was appointed under the statute, *supra*, for unrepresented heirs, and it appears that one of said heirs is already represented by an attorney of record, such irregularity does not affect the validity of the appointment as relating to the other heirs who are represented solely by him. (Estate of Roarke, 16.)

PROCESS. See appeal and Error, 21.

PROHIBITION.

1. PROHIBITION—WHEN ISSUED—NOT TO CORRECT ERROR—TO PREVENT USURPATION OF JURISDICTION—APPEAL.—Prohibition will not issue to prevent the enforcement of a judgment of a district court in condemnation proceedings, the right of eminent domain existing, and the court having jurisdiction of the suit, because of an erroneous ruling upon the sufficiency of the complaint not affecting the question of jurisdiction, as the function of the writ is to prevent a usurpation of jurisdiction, and not to secure the correction of errors, which may be remedied by an appeal. (Sanford v. District Court, 256.)
2. SAME—SAME—REMEDY—INEFFECTUAL—WILL NOT ISSUE.—A writ of prohibition will not issue where it appears that the court has already done the thing sought to be prevented, and the remedy would therefore be ineffectual. (Sanford v. District Court, 256.)

PROOF. See Action to Quiet Title, 3.

PROXIMATE CAUSE. See Railroads, 4.

PUBLIC AGENCY. See Water and Water-Rights, 2, 3.

PUBLIC HIGHWAYS.

1. PUBLIC HIGHWAYS—PRIVATE ROADS—WHAT CONSTITUTES—REV. STATS. 1901, PARS. 614, 3956, 3972, 3990, 3998, CITED.—Paragraph 3956, *supra*, provides that all roads and highways located as public highways by order of the board of supervisors, and all roads in public use which have been recorded as public highways, shall be public highways, and all roads in public use not coming within the foregoing provisions are declared vacated. Paragraph 3972, *supra*, confers authority upon the board of supervisors to lay out public and private roads in the manner therein prescribed. *Held*, that public highways are such only as come within the express provisions of the statute declaring them to be such, while private ways are such as are laid out by authority of law, and roads established without authority for the convenience of individuals are without a legal *status* either as public highways or private ways. (*Territory v. Richardson*, 336.)

PUBLIC LANDS.

1. PUBLIC LANDS—TIMBER—REMOVAL—MINING PURPOSES—INTERIOR DEPARTMENT—RULES AND REGULATIONS—SCOPE—ACT OF CONGRESS, JUNE 3, 1878, 20 STATS. 88, 1 SUPP. REV. STATS. U. S. 166, (U. S. COMP. STATS. 1901, p. 1528,) CONSTRUED.—Congress, by act *supra*, having provided for the taking of timber from public mineral lands for mining purposes, subject to such regulations as the secretary of the interior may prescribe; *held*, that the secretary may prescribe rules and regulations concerning the removal of timber, and while his interpretation of the intent of the act is entitled to weight, yet he has no power to enlarge or restrict the purposes for which timber may be used. (*United States v. United Verde etc. Co.* 186.)
2. SAME—SAME—SAME—SAME—ROASTING ORES—SMELTING.—The taking of timber from public mineral lands for the purpose of "roasting" ores at the mine, by which "roasting" the ores are not fused, but the volatile substances are driven off in vapor, gases, etc., and the ores more readily and economically smelted thereafter, is a taking for "mining purposes" within the purview of statute, *supra*. (*United States v. United Verde etc. Co.* 186.)
3. PUBLIC LANDS—TOWNSITES—TRUSTEE—OCCUPANTS—CLAIMANTS—TOWN LOTS—PURCHASE PRICE—REV. STATS. U. S., SEC. 2387 (U. S. COMP. STATS. 1901, p. 1457), CITED—REV. STATS. ARIZ. 1901, PARS. 4075, 4076, 4077, 4079, 4080, 4085, 4093, 4094, CONSTRUED.—Sec-

PUBLIC LANDS (Continued).

tion 2387, *supra*, provides that the judge of the county court may enter at the proper land-office land occupied as a townsite of an unincorporated town, in trust for the "occupants" thereof, leaving the execution of the trust to such regulation as may be prescribed by the legislature of the state or territory. Paragraphs 4075, 4076, 4077, 4079, 4080, 4085, 4093, and 4094, which provide the method of executing the trust, and require the payment by the "claimant" to the trustee of the purchase price of five dollars per lot before he is entitled to a deed, do not distinguish between "occupants" and "claimants." Payment by both actual occupants and those who merely claim the right to possession is requisite under the statute. An occupant, to be entitled to his deed, must be a claimant, file his statement, and pay to the trustee the purchase price. (*Robertson v. Martin*, 422.)

Fence on. See Fixtures, 1; Trover and Conversion, 1.

Unoccupied. See Ejectment, 5.

PUBLIC USE.

Question of law. See Eminent Domain, 4.

PURCHASER.

At execution sale, acquires equitable title, may maintain action to quiet title. See Action to Quiet Title, 4.

At judicial sale, acquires debtor's title, no more. See Execution, 2.

QUANTUM MERUIT. See Pleading and Practice, 2.

QUO WARRANTO. See Mandamus, 3, 4.

RAILROADS.

1. RAILROADS—INJURIES TO PERSONS ON TRACK—EVIDENCE—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR THE JURY.—Plaintiff and other employees of a reduction works had been accustomed for many years to go along the tracks in the yard of the defendant company. It was not shown that the defendant had given any consent to this use of its right of way, except such implied consent as might be inferred from its suffering this use to be made without objection. Plaintiff, entering upon defendant's right of way, walked along between the tracks passing a switch, where, standing immediately over the frog, was an engine, with one car coupled in front and two behind. When about one hundred and fifty feet north of the engine and cars, plaintiff glanced back and saw that they were standing still. After he had proceeded about one hundred and fifty feet farther, he was knocked down by the car attached to the rear of the engine, while the engine was making what is known as a "flying switch." The wind at the time was blowing

RAILROADS (Continued).

from the power-house of the reduction works, and plaintiff stated that he heard no bell and did not notice the noise of an approaching train, but distinctly remembered hearing the noise from the gas-engine at the reduction works. Defendant's rules prohibited the use of the flying switch when it was possible to avoid it, and when it was necessary to use it great caution was required. Making a flying switch requires a very rapid movement of the engine. Plaintiff was an old railroad man, and familiar with the method of making the flying switch. After these facts had been proved, defendant moved to instruct the jury to bring in a verdict for defendant, which motion was overruled. *Held*, that regardless of the question as to whether plaintiff was upon the right of way as a licensee or a mere trespasser, the questions of defendant's negligence and of plaintiff's contributory negligence were both for the jury. (*Arizona & New Mex. Ry Co. v. Nevitt*, 56.)

2. **RAILROADS — NEGLIGENCE — QUESTION FOR THE JURY.** — Defendant maintained a siding on a trestle, on an up grade, and at the end thereof there was no sufficient obstruction placed to prevent cars running off into a deep ravine. Defendant's freight conductor, in setting out cars on this siding, instead of employing the proper and customary method, which consisted in keeping the locomotive attached until the cars were stopped, allowed them to run on the trestle by their momentum, and it being impossible to stop them by the hand-brakes, one of the cars went over the end of the trestle, killing the brakeman who was riding thereon. *Held*, that whether the premises were reasonably safe, and, if not, whether the negligence of the railroad contributed to the injury, were questions for the jury. (*Gila Valley etc. R. R. Co. v. Lyon*, 118.)
3. **SAME — SAME — INSTRUCTIONS TO THE JURY.** — Where it appeared that the uniform custom of setting out cars on a siding was to do so with the engine attached, and that the conductor had knowledge thereof, it was error to instruct that it was for the jury to determine whether the railroad was negligent in failing to instruct its employees to set out the cars with the engine attached, and whether it was negligence not to have warned them not to set them out by allowing the cars to run into the siding by their momentum. (*Gila Valley etc. R. R. Co. v. Lyon*, 118.)
4. **SAME — ACTION FOR WRONGFUL DEATH — PROXIMATE CAUSE — FELLOW-SERVANT — INSTRUCTIONS TO JURY.** — In an action against a railroad company for wrongful death of a brakeman, the court, at the request of plaintiff, charged that if the death was caused by the negligence of the conductor, and the negligence of the defendant did not contribute to it, the jury should find for the defendant; but that if the conductor was negligent, and defendant also, and defendant's negligence contributed to the injuries, plaintiff could recover. In the main charge the court did not discuss the question

RAILROADS (Continued).

of proximate cause nor was the question presented to the jury whether, if such negligence of the conductor, who it is admitted was the fellow-servant of the deceased, was the direct or proximate cause, the defendant could still be held liable if in any way at fault. A subsequent instruction was to the effect that if the negligence of the conductor was the proximate cause of the accident, and was not coupled with any negligence on defendant's part, plaintiff could not recover. *Held*, that these instructions were erroneous, since the jury were justified in believing that, though the negligence of the fellow-servant was the proximate cause, they might find for the plaintiff if defendant was negligent in any respect, whether such negligence contributed to the injury or not. (Gila Valley etc. R. R. Co. v. Lyon, 118.)

5. ~~SAME—SAME—SAME—SAME~~—**QUESTION FOR JURY—ARIZONA LUMBER AND TIMBER Co. v. MOONEY**, 4 ARIZ. 366, 42 PAC. 952, CITED.—When the proximate cause of an injury is the negligence of a competent fellow-servant, no recovery can be had, even though the place or appliances are defective, and the master is negligent in that respect; and whether the negligence of the fellow-servant was the proximate cause or whether the defendant's negligence was a contributory cause is ordinarily a question for the jury. (Gila Valley etc. R. R. Co. v. Lyon, 118.)

6. ~~SAME—SAME—INCOMPETENCY—INSTRUCTIONS TO JURY~~.—In an action for wrongful death of a brakeman, there being no allegation of incompetency or evidence thereof, or that the company had notice of any incompetency, or could have had by the exercise of reasonable diligence, it was error for the court to instruct that if the injury was proximately caused by the conductor of the train without previous notice to the defendant of his incompetency, plaintiff could not recover. (Gila Valley etc. R. R. Co. v. Lyon, 118.)

RAPE. See Appeal and Error, 7; Criminal Law, 22, 23, 24, 25, 26, 27, 28.

REASONABLE CARE. See Negligence, 2.

REBUTTAL. See Appeal and Error, 16.

RECEIVER.

Insufficiency of grounds for. See Corporations, 1, 2, 3,

RECORD. See Appeal and Error, 26, 27, 28; Elections, 5; Judgment, 1, 2.

RELOCATION. See Mines and Mining, 6.

REPLEVIN.

1. REPLEVIN—PLEADING—GENERAL DENIAL—GENERAL DEMURRER—NOT SUBJECT TO.—As a general denial in replevin puts in issue every fact stated in the complaint necessary to sustain plaintiff's cause of action, it is error to sustain a general demurrer thereto. (*Gila Valley etc. Co. v. Gila County*, 292.)

See Appeal and Error, 3.

REVENUE LAWS.

1. REVENUE LAWS—MERCHANDISE DEFINED—PLACER GOLD—REV. STATS. U. S., SEC. 2766 (U. S. COMP. STATS. 1901, p. 1861), CONSTRUED.—The definition of the word "merchandise" given in the statute, *supra*,—"The word merchandise, as used in this title, may include goods, wares, and chattels of every description capable of being imported,"—is sufficiently broad to include placer gold. (*Six Parcels etc. Gold v. United States*, 389.)
2. SAME—FORFEITURE OF GOODS—PETITION—SUFFICIENCY—REV. STATS. U. S., SEC. 2851 ET SEQ. (U. S. COMP. STATS. 1901, p. 1901), AND 1 SUPP. REV. STATS. U. S., p. 745 ET SEQ., CITED.—Under the statutes, *supra*, providing that all merchandise imported into the country must be invoiced, which invoice shall be produced to the consul, and requiring that a declaration shall be filed with the collector of the port at the time of entry, an information for the forfeiture of goods imported into the country without authority of law, alleging that goods were imported without being invoiced or entered with any collector of customs, and without declaration to the proper revenue officer, and that some person fraudulently brought into the country from a foreign country goods which should have been invoiced, declared, and entered according to the law, with intent to defraud the government, is sufficient. (*Six Parcels etc. Gold v. United States*, 389.)
3. SAME—NON-DUTIABLE GOODS—MUST BE INVOICED—REV. STATS. U. S., PAR. 2851, CONSTRUED.—The statute, *supra*, providing a fee of two dollars and fifty cents "for every verification of an invoice and certificate before a consul or commercial agent," applies to non-dutiable as well as to dutiable goods. (*Six Parcels etc. Gold v. United States*, 389.)
4. SAME—IMPORTATION OF NON-DUTIABLE GOODS WITHOUT INVOICING AND PAYMENT OF FEES—FRAUDULENT—REV. STATS. U. S., SEC. 2851 (U. S. COMP. STATS. 1901, p. 1901), CITED.—Under the statute, *supra*, providing that consuls shall be entitled to a fee of two dollars and fifty cents for every verification of an invoice and certificate, the fee belongs to the United States, and the importation of non-dutiable goods without being invoiced or entered, and without declaration being made, is an act injurious to the government and fraudulent. (*Six Parcels etc. Gold v. United States*, 389.)

REVENUE LAWS (Continued).

5. **SAME—SAME—LIABILITY—FORFEITURE—FRAUDULENT INTENT—IMMATERIAL—ACT CONGRESS JUNE 22, 1874, c. 391, PAR. 16, 18 STATS. 189, AND ACT CONGRESS JUNE 10, 1890, c. 407, SEC. 29, 26 STATS. 141 (U. S. COMP. STATS. 1901, p. 1897), CONSTRUED.**—The act of June 10, 1890, *supra*, having repealed the act of June 22, 1874, *supra*, which provided that in all actions to declare the forfeiture of merchandise by reason of a violation of the revenue laws, the court should submit the question whether the acts were done with intent to defraud the government, to the jury the intent of the person violating the revenue laws is immaterial. (Six Parcels etc. Gold v. United States, 389.)

REVIEW.

Abuse of discretion. See Appeal and Error, 27.

See Appeal and Error, 12, 13, 14, 24; Elections, 4.

SALE.

1. **SALE—CONTRACT—POWERS—INTERPRETATION—NOT COUPLED WITH AN INTEREST—REVOCABLE AT WILL.**—Where the owner of certain mining claims, for a consideration of one dollar, and money and labor theretofore expended, and of labor thereafter to be expended on said claims, sold them to plaintiff on condition that he should pay, whenever he could sell the mines, forty-five thousand dollars, and in addition thereto one eighth of whatever was received in excess thereof, the agreement also providing that the parties were to aid each other in the negotiation and sale, and the owner agreeing to execute any deeds necessary to convey a good title to any purchaser, the agreement conveyed no title to or estate in the mines to plaintiff, but was merely a power of attorney to sell, not coupled with an interest and revocable at the will of the owner. (Taylor v. Burns, 463.)
2. **SAME—SAME—CONSTRUCTION.**—The intention of the parties to a contract must govern, as the intention is evidenced by a consideration of the entire instrument. Particular words may not be isolatedly considered, but the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them. (Taylor v. Burns, 463.)

SANITARY REGULATIONS. See Counties, 1.

SERVICE BY PUBLICATION. See Appeal and Error, 21.

SHERIFF'S DEED.

Stands on same footing as would debtor's. See Execution, 3.

SHERIFF'S SALE. See Execution, 1, 2, 3.

SMELTING. See Public Lands, 2.

SPECIFIC PERFORMANCE.

Right to, dependent upon performance of all conditions precedent.
See Equity, 3.

STAMP TAX. See Internal Revenue, 1.

STATEMENT OF FACTS.

Necessity for. See Appeal and Error, 1.

STATUTE OF FRAUDS. See Brokers, 3.

STATUTE OF LIMITATIONS. See Ejectment, 1; Mines and Mining, 2.

STATUTORY CONSTRUCTION.

1. **STATUTORY CONSTRUCTION—ATTACHMENT—ABATEMENT—LIEN—NOT DESTROYED BY DEATH—PROBATE ACT—MUST BE CONSTRUED IN LIGHT OF OTHER LAWS—INTENT OF LEGISLATURE MUST BE SPECIFICALLY STATED.**—Where the attachment law fixes a lien upon property and points out a method for its enforcement, and the abatement law makes the remedy available, notwithstanding the death of the defendant, the Probate Act must be construed in the light of these laws; and before it should be held that such lien is destroyed by the death of the defendant the legislative intent that this should result should not be inferred from a failure to specifically recognize the continuance of such lien in the probate laws, but it should appear from some positive declaration of the statute. (*Wartman v. Pecka*, 8.)
2. **STATUTORY CONSTRUCTION—STATUTE COPIED—INTERPRETATION OF STATUTE BY FORMER STATE—PRESUMABLY ADOPTED.**—Having copied *verbatim* the statute of another state, the legislature is presumed to have adopted with it the interpretation of it as given by the supreme court of the state. (*Goldman v. Sotelo*, 85.)

STOCKHOLDERS. See Injunction, 1.

STREAMS.

Underground. See Water and Water-Rights, 16, 17.

SURRENDER.

Verbal agreement of, inoperative. See Conveyance, 2.

TAXES AND TAXATION.

1. **TAXES AND TAXATION—BOARD OF EQUALIZATION—POWERS—DISCRETION.**—The revenue laws in conferring upon boards of equalization power to equalize assessments, and to add to and increase the same, confer a wide discretion upon said boards, which discretion must however be a sound one, exercised in good faith, and not arbitrarily and capriciously. (County of Cochise v. Copper Queen etc. Co., 221.)
2. **SAME—SAME—ERRONEOUS JUDGMENT—EQUITY WILL NOT RELIEVE.**—Whenever it appears that an assessor or board of equalization has exercised discretion and judgment in assessing property, no matter how erroneous such judgment may be, a court of equity will not disturb the action of such assessor or board. (County of Cochise v. Copper Queen etc. Co., 221.)
3. **SAME—SAME—DISCRETION—FAILURE TO EXERCISE—ARBITRARY ACTION—EQUITY WILL GRANT RELIEF.**—If an excessive valuation of property be made without the exercise of judgment as to the true value of such property, and be made arbitrarily, and for purposes of oppression, such arbitrary action constitutes fraud, against which a court of equity will grant relief. (County of Cochise v. Copper Queen etc. Co., 221.)
4. **SAME—TAXING OFFICERS—FRAUDULENT INTENT AND PURPOSE—NOT JUST GROUND OF COMPLAINT WITHOUT OVERVALUATION.**—A fraudulent purpose and intent on the part of the taxing officers is not enough alone to justify the interposition of a court of equity, but there must also be an overvaluation to constitute a just ground of complaint. (County of Cochise v. Copper Queen etc. Co., 221.)
5. **SAME—PLEADINGS—COMPLAINT—SUFFICIENCY—FRAUD.**—A charge in a complaint that the board of equalization did, without inquiry or evidence, arbitrarily raise the assessment of plaintiff's property, and that they did this with the design and purpose of forcing plaintiff to pay an unequal and unfair portion of taxes, without the additional charge of excessive valuation, is an insufficient allegation of legal fraud. (County of Cochise v. Copper Queen etc. Co., 221.)
6. **SAME—ACTION TO RESTRAIN COLLECTION—PLEADINGS—COMPLAINT—OVERVALUATION—ALLEGATIONS—SUFFICIENCY.**—In an action to restrain the collection of taxes, there is in effect a charge of overvaluation, where the complaint states that the board of equalization arbitrarily and without inquiry raised the assessments of the improvements on plaintiff's mines in the amount of sixty thousand dollars in excess of the full cash value thereof. (County of Cochise v. Copper Queen etc. Co., 221.)
7. **SAME—SAME—SAME—SAME—SAME—SAME—SAME.**—In an action to restrain the collection of taxes, there is not an unequivocal allegation that there was an overvaluation by the board, where the com-

TAXES AND TAXATION (Continued).

plaint states that the board of equalization, for the purpose of placing an unfair burden on plaintiff, raised the valuation of the patented mining claims owned by it, to the exclusion of other like property in the county; that the board heard no evidence concerning the cash value of the property, but arbitrarily fixed the value thereof, with the intent to discriminate against it; and that on plaintiff's information and belief the valuation by the board on the mining claims was, "according to any just method of arriving at the cash value of such property, grossly excessive." (*County of Cochise v. Copper Queen etc. Co.*, 221.)

8. ~~SAME—SAME—SAME—SAME—SAME—SAME—SAME.~~—In an action to restrain the collection of taxes, there is not an unequivocal allegation that there was an overvaluation by the board, where the complaint states that the board of equalization adopted the general rule of assessing merchandise at seventy-five per cent of the invoice price thereof; that the board was informed that the invoice price of all plaintiff's merchandise was about two hundred and twenty thousand dollars, and proof of the same was offered; and the board assessed the merchandise in the sum of \$293,875. (*County of Cochise v. Copper Queen etc. Co.*, 221.)
9. ~~SAME—SAME—OVERVALUATION—FINDINGS—SUFFICIENCY.~~—In an action to restrain the collection of taxes on the ground of overvaluation, the court's finding that the board of equalization arbitrarily increased the valuation of plaintiff's property for the purpose of imposing an unjust burden of taxation is incomplete, in that it fails to find the true cash value of the property and the taxes due thereon. (*County of Cochise v. Copper Queen etc. Co.*, 221.)
10. ~~SAME—SAME—SAME—RELIEF.~~—In redressing a wrongful overvaluation of property for taxation the court should find the true cash value of the property, and enjoin the collection of only so much of the taxes assessed as were based on the valuation in excess of the true cash value, although the assessed valuation of other like property is below the true cash value thereof. (*County of Cochise v. Copper Queen etc. Co.*, 221.)
11. ~~TAXES AND TAXATION—ILLEGAL ASSESSMENT—APPEAL—REMEDY.~~—Prior to the revision of 1901 the statutes gave no right of appeal from the board of equalization, nor was any other legal remedy afforded by the statutes for the correction of any illegal or fraudulent assessment of property. (*County of Cochise v. Copper Queen etc. Co.*, 221.)
12. ~~SAME—VALUATION—EXCESS—EQUITY—INJUNCTION—WHEN WILL NOT LIE.~~—Mere errors or excess in the valuation, or hardship or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not

TAXES AND TAXATION (Continued).

justify a court of equity to interpose by injunction to stay collection of a tax. (County of Cochise v. Copper Queen etc. Co., 221.)

13. **TAXES AND TAXATION—INJUNCTION—APPEAL AND ERROR—NEW TRIAL—WHEN GRANTED.**—An appellate court, on reversing a decree enjoining a county from collecting or in any way attempting to collect a tax, will not continue the injunction merely because the law for the collection of taxes in force when the suit was brought has been repealed, but will remand the case for a new trial inasmuch as there may be a method to collect the tax under the new law. (County of Cochise v. Copper Queen etc. Co., 459.)
14. **TAXES AND TAXATION—TAX-COLLECTOR'S DEED—VALIDITY—MUST COMPLY WITH REQUIREMENTS OF STATUTE—REV. STATS. ARIZ. 1887, PAR. 2701, CONSTRUED.**—A tax-collector's deed containing no recital of the name of the person, firm, company, or corporation assessed, and from whom the taxes were due, nor any statement that the same was "unknown," is void on its face for want of compliance with the requirements of paragraph 2701, *supra*. (Seaverns v. Costello, 308.)
15. **SAME—SAME—VOID—NOT PRIMA FACIE EVIDENCE OF TITLE—NOT BASIS FOR AFFIRMATIVE RELIEF.**—A void tax-collector's deed is not even *prima facie* evidence that the title of the owner to the premises assessed is impaired, and cannot offer basis for affirmative relief. (Seaverns v. Costello, 308.)

TAX-TITLE.

1. **TAX-TITLE—TAX-DEED—PRIMA FACIE VALIDITY—IMPROVEMENTS—LIEN FOR—LAWS 1893, p. 180, ACT NO. 84, SECS. 20, 26, CONSTRUED.**—Section 20, *supra*, provides that if property sold for taxes is not redeemed the collector must make the purchaser a deed; that the purchaser must, thirty days prior to the expiration of the time for redemption or before applying for a deed, serve on the owner a written notice, etc.; that no deed shall be issued to the purchaser until he files an affidavit showing that the notice has been given; and that, when the territory purchases, the clerk of the board of supervisors shall give the notice and make the affidavit. Section 26, *supra*, provides that if the holder of a tax-deed or a claimant under him be defeated in an action for the recovery of property, the successful claimant shall be obliged to pay the value of all improvements made by the purchaser or claimant and such amount shall be a lien on the property. Tax-deeds to the territory showed that the clerk of the board of supervisors had filed with the tax-collector an affidavit reciting that he had personally served on the owner and occupant a written notice, and that more than thirty days had elapsed since said service. Said service had not in fact been made, but claimant relying on recitals

TAX-TITLE (Continued).

had made extensive improvements on the property. *Held*, that although the plaintiff had established that the tax-deeds were invalid, and therefore claimants under the territory had no title, nevertheless the deeds were valid on their face, and entitled the claimants to lien for such improvements. (*Silver Queen Mining Co. v. Crocker*, 397.)

2. ~~SAME—SAME—SAME—RECITALS—EVIDENCE~~.—When the recitals in a tax-deed indicate the proper exercise of the powers granted in the manner required by the law, it is *prima facie* valid; but when the deed itself discloses it is executed in violation of law, or that there is a non-compliance with a substantial requirement of the law, it is void and not admissible in evidence. (*Silver Queen Mining Co. v. Crocker*, 397.)
3. ~~SAME—SAME—SAME—SAME—SAME~~.—Recitals in tax-deeds being but *prima facie* evidence, can be defeated by evidence to the contrary. (*Silver Queen Mining Co. v. Crocker*, 397.)
4. ~~SAME—SAME—ACT~~ No. 84, p. 132, LAWS 1893, SEC. 26, CONSTITUTIONAL.—The statute, *supra*, providing that in the event of the defeat of the claimant under a tax-deed the successful party shall be adjudged to pay, before being let into possession, the value of all improvements made by the said purchaser or persons claiming under him on such property, is constitutional. (*Silver Queen Mining Co. v. Crocker*, 397.)

TIMBER. See Public Lands, 1, 2.

TITLE.

Remains in vendor until payment, where option given. See Trusts, 2.

TOWN LOTS. See Public Lands, 3.

TOWNSITES. See Public Lands, 3.

TRESPASS. See Water and Water-Rights, 14.

TRIAL.

1. TRIAL — JURY — INTERROGATORIES — SUBMISSION — DISCRETIONARY — REV. STATS. ARIZ. 1901, PAR. 1427, CONSTRUED AND HELD DIRECTORY.—Paragraph 1427, *supra*, providing that “in all cases, whether law or chancery, where more than one material issue of fact is joined, interrogatories may, under proper instructions, be submitted to the jury by the court, in writing, and they shall be answered by the jury: provided, that such interrogatories shall be plain, terse, direct, and simple, shall each be confined to a single question of fact, and shall be so framed as to be answered by yes

TRIAL (Continued).

or no and shall be so answered," is directory only, and the matter of the submission of interrogatories under it in any case is left to the discretion of the trial court. (*Taggart Mercantile Co. v. Clack*, 295.)

- 2. TRIAL—VERDICT—DUTY OF COURT TO DIRECT FOR DEFENDANT—***ROOT v. FAY*, 5 ARIZ. 19, 43 PAC. 527; *ROBERTS v. SMITH*, 5 ARIZ. 368, 52 PAC. 1120, APPROVED.—Where the evidence for the plaintiff, taken as true, and in its strongest light against the defendant, presents no case upon which the plaintiff is entitled to recover, the court may instruct the jury to return a verdict for the defendant. (*Haupt v. Maricopa County*, 102.)

By jury, no right to on appeal, where not a matter of right in original action. See Appeal and Error, 22.

See Action to Quiet Title, 1; Appeal and Error, 15; Criminal Law, 4, 17, 19.

TROVER AND CONVERSION.

- 1. TROVER AND CONVERSION — PLEADING—EVIDENCE—VARIANCE—PUBLIC LANDS—FENCES ON—FIXTURES.**—In an action for the conversion of firewood, a complaint alleging its ownership by plaintiff, its conversion and sale by defendant, and his refusal on demand to pay therefor is not supported by evidence that plaintiff built a wood and brush fence upon public lands to none of which he had title; that, by mistake of fact, he built part of the fence upon ground other than he had intended; that shortly thereafter defendant took up the adjoining tract of land on which said fence stood and claimed that part of the fence which stood thereon; that thereafter plaintiff discovered his mistake, and built a wire fence ninety feet south of the fence in controversy, and that thereupon defendant detached said fence and sold the wood composing the same; that plaintiff demanded the wood, which defendant refused to surrender but claims as his own. (*Hereford v. Pusch*, 76.)
- 2. SAME — DEMAND — PLEADING — PROOF—VARIANCE.**—Where the complaint alleges the conversion and sale of property and a demand for payment for the same, evidence that plaintiff demanded the property which defendant refused and claimed the material as his own, is incompetent and immaterial and fails to support the pleading. (*Hereford v. Pusch*, 76.)

See Fixtures, 1.

TRUSTEE. See Public Lands, 3.

TRUSTS.

- 1. TRUSTS — TO DEFRAUD CREDITORS — EVIDENCE — BURDEN OF PROOF.**—Where a plaintiff seeks to show that property is held in trust in

TRUSTS (Continued).

fraud of creditors, the burden is upon him to establish that fact by full, clear, and convincing evidence. (*Costello v. Friedman*, 215.)

2. **SAME—OPTION TO PURCHASE—TITLE—REMAINS IN VENDOR UNTIL PAYMENT.**—Evidence that a purchaser at an execution sale agreed with the judgment debtor that on payment to him of the purchase price, with interest thereon, he would reconvey the same, and that the judgment debtor paid part of the purchase price, but failed to pay the balance, does not create any trust in favor of the judgment debtor, but a mere option to purchase, and the title to the property remains in the vendor until the payment of the purchase price. (*Costello v. Friedman*, 215.)

UNITED STATES CIRCUIT COURT OF APPEALS.

1. **UNITED STATES CIRCUIT COURT OF APPEALS—DECISIONS—BINDING ON SUPREME COURT, WHEN.**—Inasmuch as the circuit court of appeals is a court exercising appellate jurisdiction over the supreme court in criminal cases of this character, the supreme court is bound by its determination on this question, although the record may prevent an appeal being taken to that court in this particular case. (*Dent v. United States*, 413.)

VARIANCE. See Action to Quiet Title, 3; Mechanics' Liens, 1; Trover and Conversion, 1, 2.

VERDICT.

Cures defects of form in indictment. See Criminal Law, 2.

Duty of court to direct for defendant. See Trial, 2.

Must specify degree of crime. See Criminal Law, 11.

Will not be disturbed where there is conflict of evidence. See Appeal and Error, 7.

WAIVER. See Condemnation Proceedings, 3; Criminal Law, 9.

WATER AND WATER-RIGHTS.

1. **WATER AND WATER-RIGHTS—APPROPRIATION—ABANDONMENT—NEW APPROPRIATION.**—Where an appropriator of water was the owner of land and of a share of stock in a canal company representing a water-right privilege therein, and thereafter sold the land and stock to one S., and later repurchased the land without the stock, and after such repurchase obtained water from the canal company by renting other water-rights or shares of stock representing them. by such sale and repurchase he abandoned his first appropriation and his subsequent irrigation of the same land by means of water obtained from the company's canal then and thereby initiated a new right of appropriation. (*Brockman v. The Grand Canal Co.*, 451.)

WATER AND WATER-RIGHTS (Continued).

2. **WATER AND WATER-RIGHTS—CORPORATIONS—CANAL COMPANY—ARTICLES—PURPOSE—PUBLIC AGENCY.**—Where a corporation was organized "to carry on . . . the business of supplying a portion" of a valley "with water for irrigation . . . and to this end and for this purpose to purchase, construct, build or dig such canals, ditches or flumes as may be necessary to convey water . . . to such point or points as may be necessary," its articles do not express that its purpose was to serve its shareholders as a carrier of water and not the public generally. A purpose to become a public agency might reasonably be inferred from the language used. (*Gould v. Maricopa Canal Co.*, 429.)
3. **SAME—CANAL—CARRIER—PUBLIC AGENCY.**—A corporation was organized in 1875 to carry on and conduct the business of supplying a portion of Salt River Valley with water for irrigation purposes. From the date of its organization until 1880 it supplied any and all landowners under the flow of its canal who applied for such service, indiscriminately. The incorporators of the company, as well as later stockholders, regarded the ownership of a share of stock as carrying with it the right to have delivered, upon any lands the owner might designate from year to year, water sufficient to irrigate one hundred and sixty acres of land. After 1880 and until 1885 the company distinguished between its shareholders and other consumers of water in fixing its rates of toll for service. Subsequent to 1885 the company furnished water to its shareholders and to the lessees of shares of stock, whether appropriators or not, upon any land or lands which such shareholders or lessees might designate, and declined to furnish water to persons not shareholders or the lessees of so-called water-right deeds. *Held*, that the corporation from the time of its organization has been a public agency as a carrier of water. (*Gould v. Maricopa Canal Co.*, 429.)
4. **SAME—WATER—PUBLIC—FLOWING IN CANAL OF CARRIER—SUBJECT TO APPROPRIATION.**—Water diverted and carried in the canal of a corporation acting as a public agency as a carrier of water is public property until actually used by appropriators, and is subject to appropriation to the same extent and in the same manner as when it flowed in the channel of the river. (*Gould v. Maricopa Canal Co.*, 429.)
5. **SAME—APPROPRIATION—WHAT CONSTITUTES—OWNERSHIP OF MEANS OF DIVERSION—UNNECESSARY.**—Under the Arizona statutes, an appropriator of water for irrigation is one who makes an application of public water on land he owns or possesses. To perfect such an appropriation two things are essential—the ownership or possession of land, and the application thereon of public water to a beneficial use. No statute, either territorial or congressional, makes the ownership of the means of diversion essential to perfect the right of appropriation. (*Gould v. Maricopa Canal Co.*, 429.)

WATER AND WATER-RIGHTS (Continued).

6. **SAME—CANAL COMPANY—NOT OWNER OR POSSESSOR OF LAND—NOT APPROPRIATOR.**—A canal company organized for the purpose of the diversion and carriage of water for irrigation, and not being the owner of arable and irrigable land, is not an appropriator of water even though it does divert and carry water. (*Gould v. Maricopa Canal Co.*, 429.)
7. **SAME—APPROPRIATORS—WHO ARE—PRIORITY.**—Where a company not the owner of arable and irrigable land was organized for the purpose of the diversion and carriage of water for irrigation, all persons owning lands under the flow of its canal, which have been irrigated by means of water furnished by such canal, become appropriators and possessed of rights of appropriation in the order of their priority. (*Gould v. Maricopa Canal Co.*, 429.)
8. **SAME—APPROPRIATION—ABANDONMENT—WHAT CONSTITUTES.**—Abandonment of the right to water gained by appropriation is a matter of intent as such intent may be evidenced by the declaration of the party or as may be fairly inferred from his acts. (*Gould v. Maricopa Canal Co.*, 429.)
9. **SAME—SAME—HOW LOST.**—The right of appropriation may be lost by abandonment, or it may be lost to another by adverse user on the part of the other, continued for the period of the statute of limitations, and in no other way. (*Gould v. Maricopa Canal Co.*, 429.)
10. **SAME—SAME—ABANDONMENT—DISCONTINUANCE OF USE OF CERTAIN DITCH—DOES NOT NECESSARILY CONSTITUTE.**—The discontinuance of the use of a ditch rendered useless as a carrier of water by reason of increased diversions from the stream does not constitute an abandonment of the right of appropriation by an appropriator of water for purposes of irrigation, where it appears that he thereafter continued the use of water by means of another ditch. (*Gould v. Maricopa Canal Co.*, 429.)
11. **SAME—CORPORATIONS—CANAL COMPANY—CONTRACT FOR SERVICE OF WATER.**—Where a canal company, organized to divert and carry water as a carrier of public water for irrigation, required a user of water, at the beginning of each irrigating season, and as a condition upon which he could receive water, to sign a contract stipulating, in effect, that his use of water from the company's canal for such season should give him no right or claim to the use of water for the future, and that he waived thereby any and all right which he might have by virtue of any statute, custom, or law, to the use of water from the canal after the expiration of the period of time limited by the contract,—such contract is of no effect in lessening the liability of the canal company or the rights of the user as an appropriator of water. (*Gould v. Maricopa Canal Co.*, 429.)

WATER AND WATER-RIGHTS (Continued).

12. **SAME—WATER-RIGHTS—CORPORATIONS—CANAL COMPANY—QUASI-PUBLIC SERVANT—DUTY—SERVICE.**—A canal company diverting water from a stream for the purpose of supplying owners and possessors of arable and irrigable land is a quasi-public servant; and to the extent that it has diverted and carried water from a stream, and to the extent to which the water has been applied by appropriators for the necessary irrigation of their lands, may not arbitrarily discontinue its service in whole or in part, but must continue this service so long as it is required by said appropriators and the water is available from the common source. (*Gould v. Maricopa Canal Co.*, 429.)
13. **SAME—CANAL COMPANIES—CONTRACTS TO FURNISH WATER.**—If applications for water be made during any season to a canal company acting as a carrier in excess of the capacity of the canal the company has the right and it is its duty to limit the contracts for the season to its capacity and to those appropriators possessing the older rights of appropriation. (*Gould v. Maricopa Canal Co.*, 429.)
14. **WATER AND WATER-RIGHTS—IRRIGATION—CANAL—TRESPASS—BREAKING HEADGATES—REMEDY—EQUITY—INJUNCTION—PLEADING—COMPLAINT—SUFFICIENCY.**—In an action by an irrigation company to restrain defendants from entering upon its canal, interfering with the headgates therein, and interfering in the operation and management of its said canal and headgates, a complaint alleging ownership and possession of an irrigating ditch in plaintiff, which was used to convey water to plaintiff's stockholders and water-right holders, who were appropriators thereof, and had contracted with plaintiff for the carriage and delivery of all the water flowing in said canal; that plaintiff owned and maintained headgates for delivery of said water; that none of defendants were stockholders or water-right owners, nor had any contractual relations with plaintiff, nor any right, title, or interest in or to the canal, or waters flowing therein; that defendants had agreed to enter upon the canal and break the headgates, for the purpose of diverting water for their own use; that defendants had actually entered upon the canal, broken the headgates, and threatened to continue so to do; that the threatened acts of defendants would result in irreparable damage to plaintiff, against which it had no adequate remedy at law, sets forth all necessary facts to entitle plaintiff to the relief prayed. (*Hayois v. Salt River Valley etc. Co.*, 285.)
15. **WATER AND WATER-RIGHTS—IRRIGATION—JUDGMENT—RESTRAINING INTERFERENCE IN OPERATION OF CANAL—EVIDENCE—SUFFICIENCY—EQUITY.**—Evidence tending to prove that plaintiff owned and had been in undisputed possession and control for many years of a canal; that defendants had no proprietary interest therein, or contract relations with plaintiff, nor authority to enter upon the canal for any purpose; that prior to the commencement of this action the defend-

WATER AND WATER-RIGHTS (Continued).

ants, by mutual agreement, had entered upon said canal, broken various headgates therein, and taken therefrom water to which they claimed they were entitled by reason of former use and appropriation; that a repetition of said acts was threatened, involving injury and vexatious consequences to plaintiff company, which was then engaged in carrying water only for its stockholders and water-right owners is sufficient to sustain a judgment perpetually enjoining defendants from in any wise entering upon the canal of plaintiff or interfering with the headgates, or in any manner obstructing the plaintiff in the free and uninterrupted use and operation of its canal. (*Hoyois v. Salt River Valley etc. Co.*, 285.)

16. WATER AND WATER-RIGHTS—STREAMS—SURFACE—UNDERGROUND—APPROPRIATION—PERCOLATING WATERS—REV. STATS. ARIZ. 1887, PAR. 3199, SEC. 1, PAR. 3201, SEC. 3, AND LAWS 1893, ACT No. 86, p. 135, CITED AND CONSTRUED.—Under the statutes, *supra*, relating to the appropriation of water for beneficial purposes, the water of all streams flowing in a well-defined channel, whether on the surface or underground, is subject to appropriation. Percolating waters are the property of the owner of the soil. (*Howard v. Perrin*, 347.)

17. SAME—SAME—UNDERGROUND—EVIDENCE—BURDEN OF PROOF.—The burden of proving that underground waters flow in a natural channel between well-defined banks rests upon the person asserting it. (*Howard v. Perrin*, 347.)

See Equity, 2.

WILL CONTEST. See Probate Court, 1, 2, 3.

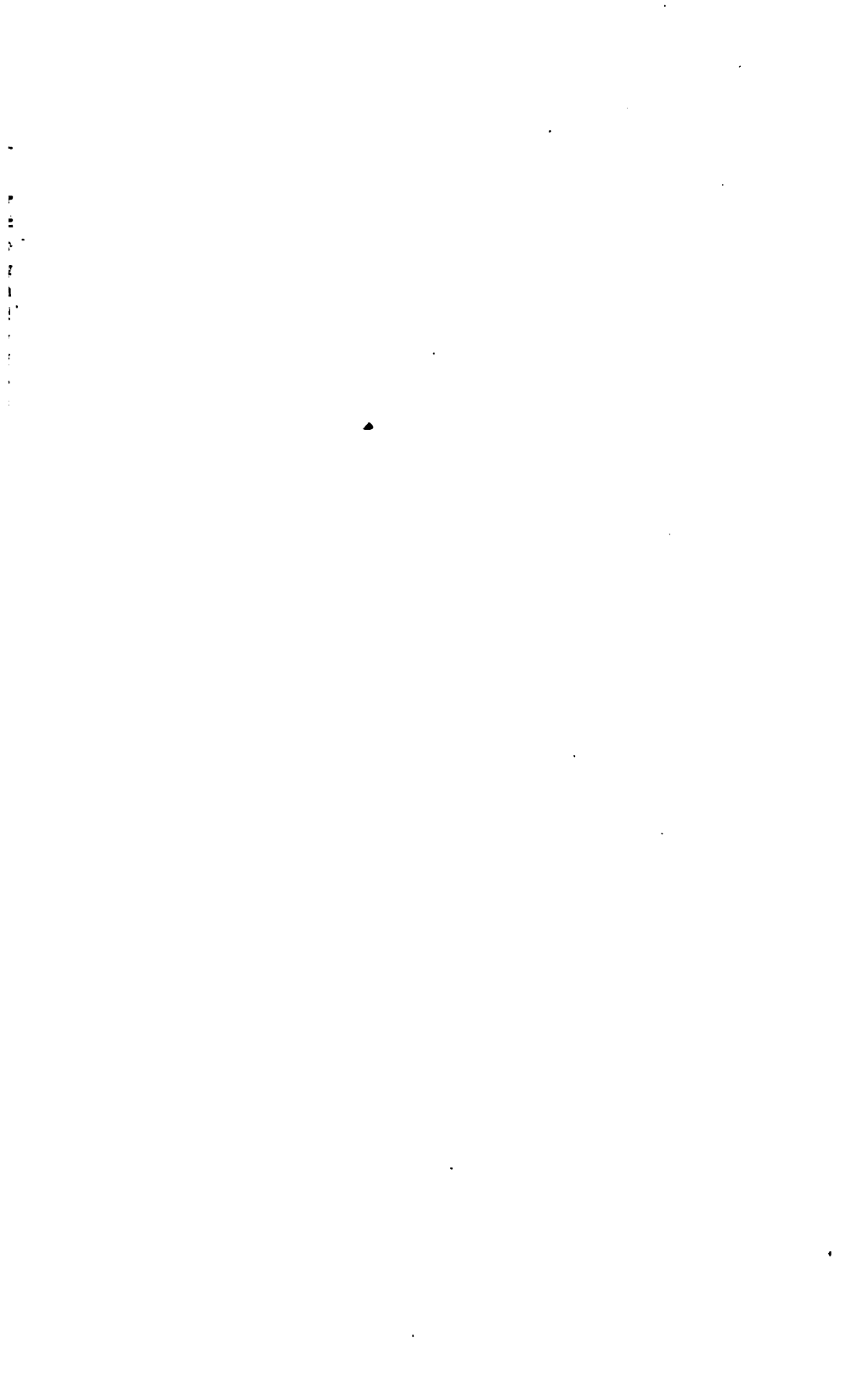
WITNESSES. See Criminal Law, 26.

WRITTEN INSTRUMENT.

1. WRITTEN INSTRUMENT—CONSTRUCTION—PAROL EVIDENCE—WHEN PROPER IN AID OF.—While it is elementary that the terms of a written instrument cannot be varied by oral proof regarding the same or the intent of the parties, and it is the province of the court to construe such instrument without further proof, where there is no doubt as to the meaning of the language of the instrument, it is also well established that where there is doubt as to what is the meaning of the words used, the court may and should receive proof of the circumstances out of which the written agreement grew and which surrounded its adoption, for the purpose of ascertaining the subject-matter thereof from the standpoint of the parties in relation thereto. (*Burmister v. The Empire Gold etc. Co.*, 158.)

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Dr. R. J. L.
10/28/07



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